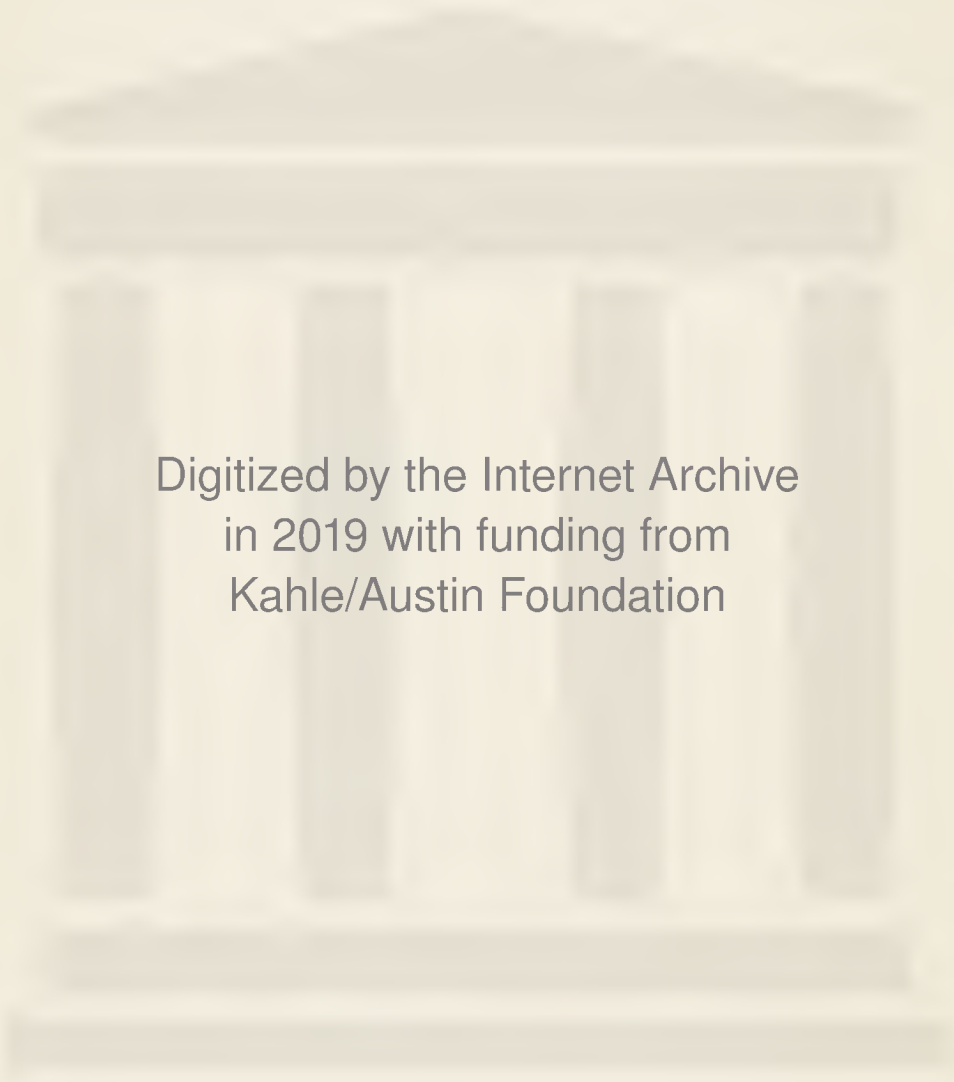

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THE FUTURE OF CODIFICATION[1]

By PROFESSOR J. L. BRIERLY, O.B.E., D.C.L., Chichele Professor of International Law in the University of Oxford; Associé de l'Institut de Droit International.

DISAPPOINTMENT at the results of the Codification Conference of 1930, though it may vary in degree in different persons, is very general among all who are interested in the subject, and is certainly justified. It is perhaps too early to balance the whole account, but it does not yet seem to be clear whether the net result may not be on the debit side, for one inevitable consequence of trying to reach agreement and failing is to underline existing differences and even to create new ones. But even if one inclines to the view that a slight advance has been registered, it will be agreed that the Resolution of the Assembly, postponing until September of this year its decision on the future of the League's activities in the domain of codification, offers a welcome respite for the consideration of the nature of the problem to which those activities are being directed and of the wisdom of the methods which have hitherto been followed.

The terms of the Resolution are as follows:

"The Assembly has taken note of the work of the Conference which was held at The Hague in March and April 1930, as a result of the initiative taken by the Assembly by its resolution of September 22, 1924, regarding the progressive codification of international law.

"It reaffirms the great interest taken by the League of Nations in the development of international law, *inter alia*, by codification, and considers it to be one of the most important tasks of the League to further such development by all the means in its power.

"The recommendations made by the Conference contain suggestions of the highest value, and must be taken into account in examining what would be the best methods for continuing the work which has been begun.

"The Assembly accordingly decides to adjourn the question to its next session, and requests the Council, in the meanwhile, to invite Members of the League of Nations and the non-Member States to communicate to it, if they so desire, their observations on these suggestions, in order that these observations may be taken into consideration by the Assembly."

It will be noticed that this Resolution affirms the interest of

[1] In an article on *The Codification of International Law*, published in the 1924 number of this Year Book, Professor Noel Baker argued that "the codifying method is not a good method, and probably not even a practicable method, of achieving the desired development of international law". So far as I have seen, no supporter of the codifying method which has been followed in recent years has attempted to meet his arguments or to refute his conclusion. The present article is largely a restatement of the views which he put forward in 1924.

the League, not in codification as such, but "in the development of international law, *inter alia*, by codification". This implies—and the reminder is timely—that the codification of international law, whether worth pursuing or not, is not an end in itself. The end can only be the development, by whatever means may be found most useful, of our existing system into something more nearly worthy of the function which it ought to be fulfilling in the world-community. It is not self-evident that the only or the best means is codification in the traditional sense.

II

The ideal of codification is that law should be embodied in a systematic written form. It is an ideal never completely realizable, because law that is living contains an element of growth and cannot be finally or exhaustively imprisoned in a series of propositions however detailed and numerous.

But in the present discussion we may assume—though few English lawyers would regard the case as proven—that the ideal in itself is one that it is desirable to realize for law in general as nearly as may be, and on that assumption go on to consider the nature of the task of realizing this ideal for international law in particular.

It is, I think, now admitted on all hands that in dealing with the materials that international law places at the codifier's disposal, his task cannot be described in these simple terms; it cannot be a task of *mere* systematization. We now have ample experience to show that, whatever topic of law is chosen, the task is quite different from a typical task of codification, like that, for example, of the codifiers of the English law of sale of goods in 1893, where the materials to hand were principles of law, for the most part already known and accepted, though suffering from the disadvantage, as it was thought to be, of being expressed in a form unnecessarily diffuse, obscure, and generally inconvenient. The materials of the international codifier do not consist of known and accepted rules, and before he can even begin the process of clarifying and systematizing them, he finds himself confronted by another and a more difficult task, that of securing an agreement on the substance of the rules themselves. It is true, no doubt, that any law which has heretofore been expressed in an unsystematic form will contain uncertainties and inconsistencies which the codifier must eliminate in the process of reducing it to systematic form, and that this process of elimination involves the making of

new law; in other words it is true that all codification involves as an incident in the process an element of what is really legislation and not true codification. But the vitally important difference between the task of codifying a mature though unsystematically expressed national law and that of "codifying" international law lies in the widely differing proportions which the legislative and the truly codifying elements bear to one another in the two tasks respectively. The legislative element in the attempt to codify any part of international law is not merely incidental and subordinate; it outweighs the codifying element to such an extent that it becomes misleading to describe the process as one of codification at all.

That the tasks are different will probably not be denied, but does that prove more than that the word "codification" has been an unhappy choice to describe the process which it is desired to apply to international law? And if that is so, is it not pedantic to object to the use of the word in a convenient, even if perhaps not scientifically accurate, sense? Does it matter that when we try to reduce international law to systematic form we find that we shall be driven to legislate and not merely to codify? Why not accept the different conditions and proceed with the work?

The answer is that the question is not one of mere terminology. The two tasks, codifying and legislating, are so different in purpose that a common technique is not possible. Hitherto we have assumed that the development of international law called for codification; and naturally we have employed a technique appropriate to codification. Now that it turns out to demand something which is not codification in the traditional sense, the whole question of technique surely requires reconsideration.

True codification is a relatively simple process. It has a limited purpose and one which is always the same. It does not set out to reform the law in general, but only to reform it in a particular way, namely, by expressing it in a convenient form. It needs therefore no motive power other than the conviction that codified is better than uncodified law. The materials are given to the codifier and he has merely to clarify and rearrange them. Further, the process is a technical process. Not being concerned with substance, but merely with form, it calls for no decisions on the policy at which the law should aim. It may therefore properly be entrusted to lawyers, for the qualities which it demands are those valuable but limited qualities that are the special contribution of lawyers to the common stock, familiarity with existing law and

skill in draftsmanship. As soon as it has been decided to systematize the existing law by codification, a commission of lawyers can be set to work and they will know exactly what they are expected to do.

But the "codifier" who finds himself concerned not merely with the form but predominantly with the substance or policy of the law, as the international codifier does, inevitably finds that his task is neither a simple nor a technical one; it has become an essentially *political* task, which he, as a lawyer, has no special qualifications whatever for undertaking. A commission of legislators cannot simply be told to get on with the task of developing or reforming the law. Before they can begin their work at all they need a programme, and legislation or law reform in the abstract is not a programme but an aspiration. Codification is a sufficient programme in itself because the substance of the law is not going to be changed in the process, and the codifier knows at the outset what he is to put into the code. But the legislator does not know what he is to put into the new law without some decision on the future policy of the law. He must have a decision that this or that provision of the existing law is unsatisfactory and should be replaced by this or that new provision, or that such and such a particular relation, hitherto unregulated by law, ought henceforth to be regulated in such and such a way. There is no escape from this necessity for a plan or programme or policy of action if a movement for the reform of law is to avoid futility. It can no more be carried through by the support of a vague impulse to produce a better international law, however sincere, than the Parliamentary drafting office could produce a bill for the reform, say, of the law of trade disputes, without having any indication of the provisions that the bill is expected to contain.

This need for a definite purpose is so elementary, so much a commonplace of the technique of effective legislation in any sphere, that it could never have been overlooked if the nature of the task of reforming international law had not been misrepresented by the facile use of the term "codification" to describe an enterprise which cannot, from the nature of its subject-matter, be codification in the traditional sense. The first condition of success for any movement which aims at reforming international law by the process of law-making conventions is a clear conception of the specific reforms which it hopes to introduce, and this condition has never been present in the modern codification movement. On the contrary, that movement has always seemed more concerned to

secure a code as such, than to secure that any particular provisions should be included rather than any other; an attitude natural enough to a movement dominated by the associations of the word, for a movement which is a codifying movement and nothing more would not need to concern itself with particular contents of the code, but only with their expression.

The experience of the Hague Conference is instructive in this connexion, for out of the three Commissions into which it divided itself, the only Commission which produced a result of any importance, the Commission on Nationality, was also the only one that had any particular reform of the law in view when it began its work. The Commission on the Responsibility of States had to deal with a subject on which there exists, and there was known to exist before the Conference met, an acute difference of opinion as to the nature of the provisions that ought to be embodied in any authoritative statement of the law. It was hopeless to suppose that in a body in which a majority had no power to overrule a minority mere general dissatisfaction with the present law could be a sufficient foundation for success, when complete disagreement was certain as to the direction in which the law ought to move. The Commission on Territorial Waters had an equally unpromising task, because on the most crucial of the matters which it had to consider, the extent of territorial waters, not only is there no very serious or at any rate no continuous practical inconvenience in the present uncertainty of the law, such as might induce a readiness to make concessions, but there is no sort of unity of interest to point the line of legal advance towards prescribing one distance rather than another. On the other hand, the existing law of Nationality does lead to two consequences, double nationality and statelessness, which are evils admitted by all. There is no uncertainty about the goal of reform in this branch of the law: it is simply the elimination or, if that is not possible, then the reduction of these two unfortunate conditions. It is true that a clear view of the goal does not make successful reform certain; there still remains the difficulty of ways and means to the goal, prejudices and vested interests to be met, concessions to be bargained for, and so on. But it does make the first steps to reform possible, and the subsequent obstacles are merely the obstacles that practically every effort at legislative reform, national and international, has to overcome. The Commission on Nationality did not wholly overcome these obstacles, but it made an impression on them which may perhaps be deepened at a future attempt. Perhaps, too,

it is not without a moral for international law reformers that the women's organizations, though without any official status at the Conference, should have succeeded in inducing the Conference to go as far as it did in accepting their demands. They at least, unlike most of the official delegates, knew exactly what changes they wanted to have introduced into the law.

It is not irrelevant to test the appropriateness of the procedure adopted in preparation for the late Conference by imagining the results of a comparable procedure applied to the process of Parliamentary legislation. Instead of the King's Speech containing the programme of legislation which the Cabinet propose to bring before Parliament, we should have a committee of lawyers charged to indicate to the House the subjects which they considered ripe for legislative treatment. We may suppose that the committee might reach the provisional conclusion that unemployment insurance is a matter which seems to require attention. Members of Parliament would then be asked whether they agree that this is an urgent matter, and if so, how they think it should be dealt with. Another committee of lawyers would then digest the replies and frame bases for discussion, and at that point Parliament would meet and try to produce an enactment reforming the law of unemployment insurance. The comparison is not exact, but it is sufficiently near to suggest that the results of the Hague Conference, such as they are, are greater than we were entitled to expect. The legislative machinery of the State, with its organized parties and its permanent legislative organ working under the majority principle, is far superior to the makeshift arrangement with which the international community has to perform a similar task, the occasional conference handicapped by the requirement of unanimity, but underneath the organizational difference the basic conditions of effective results are the same. The first condition of any successful movement of law reform is that its energies should be directed to this or that definite defect in the existing law. It must decide on a policy and then set to work to realize it. It is useless to hope that a policy of some sort—no matter what—will emerge in the course of the work.

III

A proposal was jointly submitted to the First Committee of the last Assembly by the British, French, German, Greek, and Italian Delegations which, if it is pressed at the next Assembly as it is to

be hoped it may be, may open a new and better chapter in the movement for codification. It runs thus:

"The Assembly:

Having considered the work of the Conference which was held at The Hague in March and April 1930, as a result of the initiative taken by the Assembly by its resolution of September 22, 1924, regarding the progressive codification of international law:

"Reaffirms the great interest taken by the League of Nations in the development of international law, and considers it to be one of the most important tasks of the League to further such development by all the means in its power.

"The Assembly considers that the experience which has been acquired in the process of preparing for the above-mentioned Conference, and as a result of the meeting of the Conference, renders it desirable to recognize a distinction between the gradual formulation and development of customary international law, which should result progressively from the practice of States and the development of international jurisprudence, and the formulation in international Conventions, freely accepted by the states, of precise rules, whether derived from customary international law or entirely new in character, to govern particular relations between states the regulation of which by general agreement is found to be of immediate practical importance.

"The Assembly considers that the term 'codification' as applied to the work for the development of international law undertaken by the League of Nations should be understood as an activity of the last-mentioned character, and that. in present circumstances, as was shown by the experience of the Conference at The Hague, it is not for the League or the conferences convened by it to endeavour to formulate the rules which are binding upon states as part of the customary law of nations.

"The Assembly notes that, as already recognized in its resolution of September 22, 1924, the work of the conferences convened as the result of the activities of the existing technical organizations of the League constitutes a work of codification in the above-mentioned sense.

"The Assembly welcomes the recommendations made by the Conference of The Hague in its Final Act as giving suggestions of the highest value regarding the preparation to be made by the League for future international conferences;

"And, being desirous that the eventual development of the organization of the League, for the realization of the policy set out in the present resolution, should be considered after full opportunity has been allowed to all the Members of the League to examine the results of the experience already acquired, it decides to consider at an early session in what conditions and by what methods of procedure the work of codification can most usefully be pursued."

This Resolution draws a distinction which deserves careful examination. Customary international law in general is to be left to develop, as it has in the past, "from the practice of states and the development of international jurisprudence". The Resolution does not expressly specify the assistance which the League can offer in this part of the task, but its main contribution is clearly the continuous encouragement of judicial and arbitral procedure for

the settlement of disputes, in particular by the establishment and maintenance of the Permanent Court. On the other hand, it is proposed to limit the more direct and obvious form of League assistance in developing the law, that is to say, by the promotion of international conventions, to the special cases where it is of "immediate practical importance" to regulate some "particular relation" between states by general agreement. For this latter activity of the League it is proposed to reserve the term "codification".

It is probably good policy to retain the word "codification" in spite of its theoretical inappropriateness, for if the proposed new definition is adhered to, the confusion which the word has introduced in the past can probably be avoided. The advantage of the word is that it has attracted to itself an enthusiasm of which the driving force will be very valuable, provided that it can be placed behind a cause and a method which offer some possibility of real results. The failure indeed hitherto to harness this immense power for good to the movement of real law reform which is actually going on has been deplorable. If one tithe of the interest in codification were to be diverted to the cause of restricting by law the traffic in arms, another tithe to the drug traffic, another to removing restrictions on transit, and so on, we should be nearer to the ideal of the rule of law in international affairs, which codifiers and non-codifiers have in common, than we are to-day.

But if the League is induced to accept the change of policy recommended in this Resolution, it should be understood that the states at whose instance the new policy is adopted will incur a special responsibility for making it succeed. The last paragraph of the Resolution recommends an early consideration of the conditions and methods of procedure by which the work of codification in the new sense can most usefully be pursued. It is not difficult to state in general terms what these should be, for they are already in operation. The most essential change is that the preparatory work should not be committed to lawyers. Lawyers are entirely competent for the work of codification in the old sense, but their function in a work of legislative codification is a secondary one. They have no special qualification either to choose the subject on which legislation is desirable or to frame the policy which legislation should embody. The preparatory work of legislative codification belongs properly to advisory commissions composed of specialists in particular fields, such as finance, health, communications, and the like, who are able to expose existing defects

in the law relating to the subject in which they are expert, and to frame policies for its correction. The later stage of the work is the consideration of the policies so arrived at with a view to the conclusion of a law-making convention by a conference with legislative functions, whenever the expert examination of a particular matter has reached the stage at which it seems ripe for such treatment.

There are many matters in the detailed application of such a method which ought to receive attention in the examination proposed by the Resolution quoted above. But a word of caution is desirable. The "codification" proposed to be undertaken will in no circumstances be an easy or rapid task. Any attempt at reform in the international field encounters special difficulties, due both to the imperfection of the machinery available there for legislative action, and to the weakness of the public opinion upon which the efficiency of such machinery inevitably depends. Difficulties of this kind are not peculiar to, but they are greater in, the international field. In no political society are all men yet so reasonable or so like-minded that changes in the social order can be introduced without friction or delay. Reform, however reasonable, has always to contend with apathy and vested interests; it makes mistakes and has to retrace its steps; it can never afford to despise even insignificant successes. No conceivable improvement of international methods, therefore, will eliminate such sources of discouragement as these if we take a short view and look for quick results, for they are an inseparable part of the process of social adjustment in any sphere whatever.

There are, however, points both of policy and of procedure on which it is possible to suggest improvements. In the first place, more discrimination might be exercised in the choice of subjects which are to be taken up. No doubt that is not easy, but the tendency to allow the League to be regarded as a home for all good causes ought to be discouraged. No subject should be taken up unless it is both (*a*) important in itself, and (*b*) really international, that is to say, one in which ameliorative action on the merely national plane is bound to be ineffective. This limitation is necessary because concentration of the available resources is essential. The foreign offices and other departments of most governments are already overworked, and they all have immediate tasks which cannot be postponed; it is unfair and in the end it will not pay to impose upon them additional work of which the value even on a long view promises to be insignificant.

The selection of subjects, however, on these lines can only be influenced by a country whose policy in the matter is known to be sincere. The policy of opposing every proposal which involves any expenditure of money, which was not unfairly regarded as the policy of the British Government at Geneva a few years ago, is not only stupid and discreditable in itself, but defeats its end by destroying the influence we might otherwise exercise. A critical attitude is imposed upon us by our national temperament and by our semi-detachment on some of the questions which arise, but our criticism can be constructive, and if the League policy on codification is changed partly at our instance, we shall be in honour bound to see that it is so.

Much useful work has been done at Geneva recently with a view to improving the legislative methods of the League. In January 1930 the Council appointed a committee to consider the ratification and signature of conventions concluded under the auspices of the League, and the committee's report makes many valuable suggestions.[1] They pointed out that the present position is by no means discouraging, and is indeed more satisfactory than the position as regards ratification of conventions negotiated outside the League. They suggested five causes of delay in ratification: (*a*) the complication of government machinery, e.g. it is often necessary to consult different departments, not all of whom may be sympathetic; the final decision may rest with different persons from those who conduct the negotiations, and so on; (*b*) parliamentary approval may be necessary, and parliaments have limited time and tend to give priority to matters of immediate domestic interest; (*c*) acceptance may involve domestic legislation or sanction for expenditure; (*d*) difficulties unnoticed at the time of signature may come to light later; (*e*) a government sometimes postpones the ratification of one convention pending the conclusion of another on which it is thought to be dependent.

Some of these causes of delay the committee recognized to be unavoidable. They pointed out, however, that certain ameliorative steps had already been taken, e.g. by the periodical publication of information on the progress of ratification of League conventions, by the practice of the Council in directing the Secretary-General to call the attention of states to the desirability of their ratifying conventions, and by provisions in particular conventions, such as those by which states undertake to notify their intention one way or the other within a certain time, or by which

[1] League publications, V, Legal, 1930, V. 11.

a second meeting of a conference is provided for to determine under what conditions a convention should be put into force. They proceeded to make the following suggestions for further action on the same lines. (*a*) That in order that information may be obtained as to the specific cause of delay in ratification, each signatory Power should be asked to state its attitude towards any convention which it has not ratified within a certain time after signature. (*b*) That useful educative work can be done by unofficial organizations interested in international co-operation. The consideration of international conventions ought to be a regular item on the agenda of legislatures. (*c*) That better preparatory work is necessary, so that a conference may not overlook difficulties which will cause trouble later, or be tempted to adopt solutions by way of compromise which result only in making a convention not worth ratifying. (*d*) That the procedure of the International Labour Office might be adapted to League conventions, so that a government would undertake in the protocol of signature either to submit the convention for parliamentary approval or to inform the Secretary-General of its intentions within a certain time. (*e*) That the protocol of signature might provide that if after a certain time a certain number of states had not become bound by the convention, the signatories would meet again to examine the whole position and see whether the difficulties of non-ratifying states could be removed by amending the convention. (*f*) That in the case of a convention whose utility depends on its prompt acceptance by a large number of states, the protocol of signature might provide that if the number of ratifications required to bring the convention into force is not obtained by the date fixed, a conference should meet to consider the question. (*g*) That the possibility of making certain technical agreements not subject to ratification at all should be borne in mind. (*h*) That the practice of leaving a convention open for signatures during a certain period, which is adopted in order to increase the number of signatures, tends to delay ratification, and the period therefore should not be a long one.

The last Assembly also adopted certain resolutions[1] giving effect to some of the Committee's suggestions. They emphasize that the problem of ratification depends first and foremost on satisfactory preparation for the conferences at which conventions are drawn up, since ratification ought not to be expected unless a convention is both properly drafted and valuable in itself. They

[1] Verbatim Record, October 3, 1930, p. 12.

recommend a procedure, adapted from that recently adopted by the Labour Office, whereby when an organ of the League, or the Assembly itself, or a government, as the case may be, proposes a convention on any matter, the first step should be the preparation of a memorandum for the Council, explaining "the object which it is desired to achieve by the conclusion of the convention, and the benefits which result therefrom". If the Council approves the proposal in principle, a first draft convention is to be prepared and communicated with the memorandum to governments for their views. The Assembly is then to consider in the light of the observations of the governments whether the matter should be carried further. If it is decided to proceed, the Council will arrange for a revised draft convention to be circulated to the governments, and in the light of the results of this second consultation, it will determine whether a conference should meet, and if necessary fix the date. Such a procedure would admirably secure the point upon which it has been the main purpose of this article to insist, namely that the first condition of the reform of international law by the process of law-making conventions is not the mere vague feeling that it would be a good thing to make a convention of some sort or other on such and such a subject, but a policy or programme of specific reforms, the embodiment of which in the law is accepted generally as an object worth working for.

THE UNIFICATION OF THE LAW OF BILLS OF EXCHANGE

By H. C. GUTTERIDGE, K.C., LL.D., some time Cassel Professor of Commercial Law in the University of London: Fellow of Trinity Hall and Lecturer in Law in the University of Cambridge.

A GREAT many fruitless attempts have been made in the past to unify the law of bills of exchange. The narrative of these endeavours is a long and complicated story,[1] which centres round the two International Conferences which were convened by the Netherlands Government at The Hague in 1910 and 1912. A great step forward has now been taken by the signature of three conventions at the Conference held at Geneva in May 1930 under the auspices of the League of Nations. The first of these provides for the adoption of a uniform law of bills of exchange and promissory notes; the second deals with conflicts of laws arising in connexion with these instruments; whilst the third is a very short convention which has as its object the removal of impediments caused to the free circulation of negotiable instruments by the existence of stamp duties. Great Britain was not a party to the first two conventions, but adhered to the third, with certain reservations.[2] The proposals to unify the law relating to cheques were postponed to be considered at a further conference at Geneva in February 1931.

It would obviously be out of place to discuss the technical details of the Uniform Law of Bills of Exchange in the pages of the *Year Book*, and I propose, therefore, to deal solely with those aspects of the Geneva Conference which emphasize its importance as a remarkable achievement in the realm of international co-operation. It has been said, with justice, that the atmosphere of Geneva is peculiarly favourable to the settlement of international differences in cases in which freedom from political or racial prejudice can be secured, and the successful outcome of the Bills

[1] A detailed account of the various efforts made to secure unification will be found in "Geschichtliches zur Verwirklichung der Vereinheitlichung des Wechselrechts", by Professor Balogh in *Acta Academiae Universalis Jurisprudentiae Comparativae*, 1928, Vol. I, p. 881. See also "Les Perspectives de l'Unification du Droit de Change depuis 1910", by Dr. Max Franssen, 1930, Duchemin, Paris, and "Der heutige Stand der Bestrebungen zur Vereinheitlichung des Wechselrechts", by Dr. von Flotow, in *Zeitschrift für ausländisches und internationales Privatrecht*, Vol. I, p. 68.

[2] For the text of the conventions, see League of Nations Series II, C. 360, M. 151, 1930, II.

of Exchange Conference of 1930 furnishes an admirable illustration of this tendency. The three conventions are also of considerable interest from the point of view of the technique of "convention making", and it is possible that their influence on the form of conventions of this type may be lasting and far reaching. No apology seems to be necessary for a critical examination of the provisions of the Convention on the Conflict of Laws, which represents a sincere, though perhaps not conspicuously suceessful, attempt to unify the rules of Private International Law relating to the rights and liabilities of parties to bills of exchange. Incidentally it provides a good example of the serious difficulties which are encountered whenever any attempt is made to unify the rules of a branch of legal science, which, though international in name, is in effect rigidly national in character. I propose therefore to examine the provisions of the Convention on Conflicts of Laws somewhat closely, particularly in view of the hope expressed by the Conference that the Anglo-Saxon countries might at some future date be disposed to adhere either to this convention or to a subsequent convention framed on similar lines.

The first and most important task which awaited the Conference was the consideration of draft proposals for the Unification of the Law of Bills of Exchange, which had been prepared by a committee of experts appointed by the League of Nations. The instructions given to the experts were that the possibility of a world-wide unification was too remote to be taken into account at the present time, and that their efforts should therefore be directed to the formulation of a scheme which might result in the unification of the thirty or more different systems which prevail on the Continent of Europe, and in certain other countries such as Japan and the Central and South American Republics. This was to be their main objective, though it was indicated to them that the possibility of bridging over the gap between the Continental and the Anglo-Saxon systems in individual instances was not to be ignored. They were directed to take, as the basis of their draft, the Uniform Regulations which were adopted at the Hague Conference of 1912, but in general they were left a free hand as to the form which their proposals should ultimately take.[1] The decision to adopt the Uniform Regulations of 1912 as the ground-

[1] Three committees of experts were in fact appointed as the result of a resolution of the Brussels Financial Conference of 1920, which requested the Lcague of Nations to intervene in the matter. The first committee consisted of legal experts, viz. Professor Jitta, Professor Klein, Professor Lyon-Caen, and Sir Mackenzie Chalmers. The second committee was composed of banking experts, including a representative of Great

work for the deliberations of the 1930 Conference was undoubtedly wise, as by this method the fruits of the earlier attempts to unify the law were utilized to the best advantage. The Hague Regulations of 1912 had been approved by the delegates of thirty countries, but for various reasons, such as a reluctance on the part of certain governments to introduce the necessary legislation, and the outbreak of war in 1914, the action of the delegates was for the most part never ratified. It may be observed in passing that, although Great Britain and the United States were represented at the Hague Conferences of 1910 and 1912, and took a prominent and influential part in the discussions,[1] neither country was a party to the adoption of the Uniform Regulations. It must not be thought that the two Hague Conferences were altogether abortive. The Uniform Regulations of 1912 have had a deep influence on the development of the Continental law of bills of exchange. In particular the legislation of the new states of Central Europe, which came into being after the war, is being moulded to a very considerable extent along the lines of the Uniform Regulations, and in 1928 the Pan-American Conference at Havana recommended that the Central and South American countries should adopt the Regulations of 1912 as the basis for the unification of their law.

The Geneva Conference assembled on the 13th of May and sat until the 7th of June, 1930. The following countries were represented: Austria, Belgium, Brazil, Colombia, Czechoslovakia, the Free City of Danzig, Denmark, Ecuador, Finland, France, Germany, Great Britain and Northern Ireland, Greece, Hungary, Italy, Japan, Latvia, Luxemburg, the Netherlands, Norway, Peru, Poland, Portugal, Rumania, Siam, Spain, Sweden, Switzerland, Turkey, Venezuela, and Yugo-Slavia. The United States of America were represented by an observer, Mr. Martin H. Kennedy. The delegates included bankers and merchants, as well as judges, lawyers, and diplomatic representatives. The Italian delegation, for instance, was composed of a diplomatist, four professors of law, a representative of the Minister of Finance, two lawyers

Britain, Mr. Alwyn Parker. The third committee, which included no British representative, was a committee of jurists which prepared the draft proposals for the Conference. The instructions to the various committees and their reports are to be found in the League of Nations Series C. 487, M. 203, 1923, II; C. 103 (2) M. 48 (1), 1927, II; C. 234, M. 83 (1929), II.

[1] The British delegates to the Hague Conferences of 1910 and 1912 were Sir Mackenzie Chalmers and the Rt. Hon. F. Huth Jackson, Governor of the Bank of England. The United States were represented at both Conferences by Mr. Conant, a well-known authority on financial questions.

representing the bankers, and two lawyers representing the merchants. The Japanese delegation included the Japanese Minister at Vienna, two judges, and two diplomatists. The Economic Committee of the League, the International Chamber of Commerce, and the Rome Institute for the Unification of Private Law were also represented at the Conference. The utmost goodwill and courtesy characterized all the meetings of the Conference, and there was a remarkable absence of friction of any kind even when very controversial topics were under discussion. The credit for this admirable feature of the Conference must be attributed in no small degree to Dr. J. Limburg, who presided over the Conference with unruffled urbanity, firmness, and tact, and also to the unfailing courtesy and efficiency of M. Smets, the Secretary-General to the Conference, and his staff. The arduous task of putting the resolutions of the Conference into shape was confided to a *Comité de Rédaction* presided over by His Excellency Signor Giannini, Chief of the Italian Delegation, assisted by Professor Percerou of Paris, who acted as *Rapporteur Général*, M. Ekeberg of the Swedish Delegation, Herr Quassowski of the German Delegation, and Professor Sulkowski of the Polish Delegation. The British delegate was invited to attend the meetings of this committee in an unofficial capacity in order to act as adviser on any questions relating to English law or to the drafting of the English text of the resolutions. The Conference opened with a brisk skirmish on the question of policy involved in the scheme proposed by the Committee of Experts. It should be mentioned that the Hague Convention of 1912 was imperative in character, i.e. it was open to any country to accept or to reject the Uniform Regulations as a whole, but not to accept them in part or subject to qualification, save in so far as was permitted by the reservations contained in the Convention itself. The drafts laid before the Conference of 1930 were based on a different principle and took the form of a draft Model Uniform Law which was not to be binding on any signatories of the proposed Convention, but was intended to form the groundwork of subsequent legislation by the contracting parties. No reservations were therefore contemplated by the draft, it being left to the discretion of each of the signatories to adopt the Model Law as a whole or in part, or to modify it in any way which might be considered necessary. The motive behind the substitution of a model uniform law in the place of obligatory rules was the hope that it would be possible by this means to secure the cooperation of certain states which might be reluctant to abandon

their legislative independence. One of the objections which had been raised against the Hague Convention of 1912 was that it could not be denounced by a signatory state until three years had elapsed from the date at which it came into force, the denunciation taking effect one year later. Thus a signatory state would be debarred for a period of four years from altering its municipal law relating to bills of exchange, promissory notes, or cheques, except in the rare cases in which the uniform regulations had left any matters to be determined by the municipal laws of the signatories. The proposal of a model law, which could be amended at will, would obviate this difficulty, and would further render it unnecessary in the case of any individual rule to consider the extremely delicate questions which arise when it is proposed to permit reservations (either of a general or a limited character) to the provisions of a convention of this nature. It is obvious, of course, that a law, which purports to be uniform, may be reduced to a farce if the reservations to the law are sufficiently numerous, and that the result may in that case merely be what a French writer has termed *une unification de façade.* On the other hand the objections to a model law are manifest; a proposal of this kind amounts in effect to an invitation to the signatories of a convention to select such portions of the Model Law as may meet with their approval and to reject the rest, leaving the unification of the law almost as much in the air as it was before. It is not surprising that this particular feature of the scheme of the experts was the subject-matter of severe criticism and of a certain amount of propaganda before the Conference met.[1] The scheme of the experts was defended at the Conference, but it soon became obvious that there was little or no support for it. Therefore, without taking a vote on the matter, the President declared that the Conference would adopt the procedure followed at The Hague in 1912, treating the proposals of the experts as a scheme for a Uniform Law which should be binding on signatories of the Convention, subject to such reservations as might be allowed by the Convention itself. He expressed the hope, however, that reservations would be avoided, even though this might involve sacrifices on the part of individual states.

The deliberations of the Conference lasted for rather more than three weeks, and resulted in the signature of the three Conventions

[1] See, for instance, "Zur Revision des Haager Wechselrechtes" (*Mitteilungen des Verbandes österreichischer Banken und Bankiers,* 1929) by Professor Josef Hupka; "Die Vereinheitlichung des Wechselrechtes", *ibid.*, by Hofrat Albert Wehli.

by the great majority of the delegations.[1] The Convention for a Uniform Law contained twenty-two reservations—a somewhat large number—though it is not possible to say at present how far the process of unification will be impeded by the existence of these reservations, some of which are by no means unimportant. For instance, the system of *provision* peculiar to the Latin countries has been reserved,[2] and it would not be surprising if this reservation should lead to some difficulty and dissatisfaction hereafter, as it relates to a legal theory which is quite at variance with the principles prevailing in Germany and those countries which have adopted or followed German law. The scheme of reservations is somewhat complicated; in some cases the desire to adopt a reservation must be notified at the time of ratification or accession, whilst in certain other cases the reservation remains dormant but may be adopted by a state at any time and with immediate effect in circumstances of urgency. The provisions for denunciation of the Uniform Law are also somewhat special in character. The law, when introduced, is to remain in force for at least three years, i.e. it may be denounced after two years, the denunciation taking effect a year later. Provision is made for "urgent denunciation", i.e. in exceptional circumstances the law may be denounced forthwith, the denunciation becoming effective two days after its communication to the other signatories. The decision as to the circumstances which constitute urgency is left to the discretion of the individual signatories.

The above is the framework of the system which introduces the Uniform Law. As to the Law itself, it suffices to say that it is to a large extent based on the German law, and follows the Hague Regulations of 1912 somewhat closely. From the Anglo-Saxon point of view it marks a distinct advance, because in future the English or American lawyer or man of business will probably have to reckon only with one Continental system of law instead of

[1] The conventions were signed on the last day of the Conference by twenty-two countries, viz. Austria, Belgium, Brazil, Colombia, Czechoslovakia, Danzig, Denmark, Ecuador, Finland, France, Germany, Italy, Luxemburg, the Netherlands, Norway, Peru, Poland, Portugal, Spain, Sweden, Switzerland, and Turkey. Greece, Hungary, and Japan signed at a later date. Great Britain signed only the convention on stamp duties.

[2] *Provision* is a term which is not easily translated into English. It indicates the theory according to which a bill of exchange is always drawn against cover in the drawee's hands, e.g. funds lodged for the purpose or a debt due from the drawee to the drawer. The effect of the theory may be stated broadly as giving the holder of the bill a preferential right to this cover in certain events, notably where the drawee fails to pay the bill.

thirty or forty, as heretofore, subject of course to an element of complication introduced by the reservations to the Uniform Law. Further, in certain respects the Uniform Law approaches more nearly to English and American law than any of the pre-existing systems, and it must be admitted that there are certain of its provisions which represent an advance on the corresponding Anglo-American rules. At the same time it must be stated quite frankly that the Uniform Law is such that its adoption by the Anglo-Saxon countries is altogether out of the question. It incorporates certain requirements as to form and formalities which are repugnant to Anglo-American concepts of law and business practice. Thus, every bill or promissory note must be described as such in the body of the instrument. There are lengthy and detailed rules regulating the time at which and the manner in which a bill of exchange or promissory note must be protested for non-acceptance or non-payment. More serious, however, are the divergences between the two systems as regards matters of substance. Under the Uniform Law, title to a bill can be made through a forgery, a provision which strikes at the root of the principles of the English law of negotiable instruments. The position of a holder in due course is left somewhat in obscurity by the Uniform Law, owing to the difficulty which was experienced in reconciling the different Continental theories as to the meaning of "good faith". Partial acceptance and partial payment are permitted whether the holder of the bill consents or not. Bills may not be drawn in favour of "bearer",[1] though, oddly enough, effect is given to blank endorsements, and an endorsement of a bill to bearer is made equivalent to an endorsement in blank. There is no need to multiply the list of differences between the rules of the Uniform Law and those of Anglo-American law, as some of them are relatively unimportant; but the instances given will suffice to show that very grave questions of principle are involved. It may be added, however, that in one important respect the Uniform Law represents a move towards the Anglo-Saxon system, namely in so far as it recognizes and regulates the issue of bills signed in blank. It would also be ungracious on the part of the present writer to refrain from mentioning that, throughout the deliberations of the Conference, the

[1] It is somewhat difficult for an English lawyer to appreciate the reasons underlying the hostility of Continental lawyers towards bearer instruments. Its origin appears to be the Roman Law conception of the strictly personal character of a contract, cf. Savigny *Obligationenrecht*, II, 101.

rules of English law were constantly referred to, and that the amendments put forward by the British Government were very carefully considered and, with one or two exceptions, were granted by the Conference. In fact it was admitted by certain of the delegates, in the course of private conversations with the writer, that the elasticity of the English law, and its freedom from the bonds of formalism, were matters of envy to Continental lawyers, but that different conceptions of commercial morality in some of the countries made the adoption of a rigid and formal system throughout Europe a matter of vital necessity. In conclusion it should be stated that the attitude of the British Government towards the problem of unification appeared to be well understood and appreciated. It was recognized that there was far greater unity of law among the Anglo-Saxons than on the Continent of Europe, and that to ask England to imperil this great achievement by altering her law without the concurrence of the other Common Law countries was to demand an impossible sacrifice, and one which would not be in the ultimate interests of world-wide unification.

The Convention on Stamp Duties only calls for brief notice. Its object was to do away with the penalization of the holders of unstamped instruments by the fiscal laws of certain countries. Great Britain signed the Convention with a reservation, limiting its application to bills drawn in the United Kingdom, but accepted or payable abroad. This should prevent the occurrence of cases of hardship where bills drawn in the United Kingdom on unstamped paper have circulated abroad, and the unfortunate foreign holders of such bills have discovered that they have parted with their money in return for worthless pieces of paper. It is perhaps not without interest to note that a special reservation was inserted in the protocol to this Convention to meet any difficulties which might arise owing to the relative fiscal independence of Northern Ireland.

The signature of a separate Convention relating to the Conflict of Laws marks a departure from the policy pursued at The Hague. The Conferences of 1910 and 1912 only dealt with certain cases of conflicts, i.e. (*a*) conflicts as to capacity, (*b*) conflicts as to the form of bills of exchange, and (*c*) conflicts as to the form and limit of time for protests of dishonoured bills. No attempt was made to deal with any other questions, and the rules agreed upon, which were three in number, were not made the subject-matter of a separate convention, but were embodied in the Uniform Regula-

tions. The draft prepared by the committee of experts for the Geneva Conference contemplated a separate convention which was to deal both with conflicts of laws and with stamp duties. In the course of the discussions it was decided, largely in order to facilitate the adherence of Great Britain, to split this convention, and to deal separately with these questions. It was also decided that the subject-matter of the Convention on Conflicts should not be limited to the questions specified in the Uniform Regulations of 1912, but should also include rules for the determination of conflicts arising as to the rights and liabilities in general of parties to bills of exchange.

The Convention on Conflicts of Laws, in the form in which it was ultimately signed, contains twenty articles, the majority of which are purely formal in character. The substance of the Convention is to be found for the most part in four articles (Articles 2 to 5) which deal with the questions of capacity, form, and the liabilities of the parties. The Convention represents, in part, an attempt to frame new rules, and, in part, merely the reiteration of well-settled rules of Private International Law. It is with the former that we are concerned here.

It was suggested in the course of the Conference that there was no real need for the Convention, as the idea of unification connoted the absence of any conflicts of laws. "What is the use", it was said, "of a convention which purports to deal with a situation which *ex hypothesi* should never arise?" This view of the matter was, however, not accepted by the Conference. It was pointed out that it was by no means certain that there would be universal ratification of the Uniform Law; that there were countries other than the Anglo-Saxon countries which were standing aloof from the proposed unification of the law; that in any event the limitation of the scope of the Uniform Law by a number of reservations would make it necessary to provide for the regulation of conflicts which would arise from this source. Stress was also laid on the point that countries which found themselves unable to accept the Uniform Law might, nevertheless, be willing to become parties to a convention for the settlement of conflicts, and, in particular, it was hoped that this might prove to be so in the case of the English-speaking countries. It is, of course, beyond dispute that universal agreement on the question of conflicts of laws would be an achievement only second in importance to the world-wide unification of the law. This, then, was the atmosphere in which the discussion of the draft convention was opened, but it soon became

obvious that sharp differences of opinion existed on certain of the fundamental principles involved in the process of unification of the rules relating to conflicts. At one time it appeared as though the attempt to secure uniformity would have to be abandoned, but the general desire to round off the work of unification commenced by the adoption of the Uniform Law prevailed, and the amendments which placed the future of the convention in jeopardy were ultimately withdrawn. The convention was saved, but in its present form it must be regarded as a compromise which may possibly lead to results which were not desired or even contemplated by the Conference.

Article 2 deals with the question of capacity, which it endeavours to solve in an ingenious but not altogether convincing manner by the use of the doctrine of renvoi.

It runs as follows:

"The capacity of a person to bind himself by a bill of exchange or promissory note shall be determined by his national law.

"(Proviso I) If this national law provides that the law of another country is competent in the matter this latter law shall be applied.

"(Proviso II) A person who lacks capacity according to the law specified in the preceding paragraph, is nevertheless bound if his signature has been given in any territory in which according to the law in force there, he would have the requisite capacity.

"(Proviso III) Each of the High Contracting Parties may refuse to recognize the validity of a Contract by means of a bill of exchange or promissory note entered into by one of its nationals which would not be deemed valid in the territory of the other High Contracting Parties otherwise than by means of the application of the preceding paragraph of the present Article."

It will be observed that the article provides in the first instance that the capacity of a person to bind himself by a Bill of Exchange or promissory note is to be determined by his national law. But as this solution is one which can hardly be acceptable to those countries which base their concepts of Private International Law on domicil or on the *lex loci contractus* rather than on nationality,[1] the rule as stated above is qualified by Proviso I, which states that

[1] The question of capacity in commercial transactions is by no means clear. Austria, Belgium, France, Germany, Switzerland, the Netherlands, the Scandinavian countries, Spain, Greece, Poland, Yugo-Slavia, Czechoslovakia, Finland, Japan, and Portugal base capacity, in this instance, on the national law of the party. The Argentine, Bolivia, Peru, Paraguay, and Uruguay have adopted the test of domicil. The *lex loci actus* prevails in Chile, Costa Rica, Colombia, Ecuador, San Salvador, and possibly also in Rumania and Italy. So far as the English-speaking countries are concerned, the better opinion would seem to be that capacity in mercantile affairs is governed by the *lex loci actus*. See Dicey, 4th ed., p. 599, and cf. *Republic of Guatemala* v. *Nunez* (1927), 1 K.R. 669: *Re Anziani* (1930), 1 Ch. 407.

if the national law of the *de cujus* provides that the law of another country is competent in the matter, this latter law shall be applied. This proviso is, of course, the doctrine of renvoi, coupled with a short-circuiting of the to and fro process, or a rupture of the *circulus inextricabilis* at the first renvoi. The object of this device was to reconcile, as far as is feasible, the different theories of the law governing capacity. Thus let us assume that by the law of Ruritania a person acquires capacity at the age of 21 years, but that by the law of Arcadia the corresponding age is 19 years. Let us also suppose that the Ruritanian system of private international law provides that the question of the law governing capacity depends on the domicil of the *de cujus*, whilst by the Arcadian system capacity is governed by national law. *X*, a Ruritanian national aged 19, domiciled in Arcadia, signs a bill of exchange in Arcadian territory, and it is sought to enforce the bill against him in an Arcadian court. Under Article 2 of the Convention his capacity depends in the first instance on Ruritanian law, which is his national law, but that law refers the matter back to the law of his domicil, viz. Arcadia. By virtue of the first proviso to Article 2, the Arcadian court must accept the renvoi and apply its own law, and *X* will, therefore, be liable on the bill. It is also possible to conceive of a case in which the renvoi may take the form of a *Weiterverweisung*, or second reference. Thus let us suppose that *Y*, a Utopian national, aged 20, domiciled in Illyria, signs a bill whilst on a business journey in Lutetia, and is sued on the bill in the Lutetian courts. By the Law of Utopia, capacity is acquired at the age of 21, and capacity is governed by the law of the domicil. By the law of Illyria, capacity is also acquired at the age of 21, but the law governing capacity is the *lex loci contractus*. The Lutetian law fixes the age of capacity at 20, and provides that capacity is determined by the law of the nationality. Under Article 2 of the Convention, the Lutetian courts will in the first instance apply the national law, viz. the law of Utopia. That law refers back to the law of the domicil, viz. the law of Illyria. Illyrian law refers the matter over to the law of Lutetia, the *lex loci contractus*. The Lutetian court applies its own law and *Y* is liable.

On paper this is no doubt an admirable attempt to solve a difficult problem, in so far as it may operate as a buffer between the rival theories of domicil and nationality, but its effect is very considerably restricted in practice by the second proviso to Article 2. The article, after dealing with the matter in the way which has been indicated, goes on to state in Proviso II that a

person who lacks capacity according to the law specified in the preceding paragraph is nevertheless to be bound if his signature is valid according to the *lex loci contractus*. Thus, *M*, a Ruritanian national aged 19, domiciled in Ruritania, signs a bill in Arcadian territory. Under Proviso I, if it stood alone, the Arcadian court would be compelled to apply the national law, i.e. Ruritanian law, and *M* would escape liability. But the effect of Proviso II is to enable the Arcadian court to apply its own law (the *lex loci*) and to hold *M* liable.

If it is permissible to pause here and to take breath for a moment, it is difficult to resist the conclusion that all this is a very prolix and roundabout method of formulating the proposition that the *lex loci contractus* is accepted as the governing principle. It is somewhat difficult to see why Article 2 should have been framed in this way, unless, as seems probable, the underlying motive was to render lip-service to the doctrine of nationality, whilst at the same time depriving it of practical effect in any case in which it is in dispute.

If the matter rested there, these observations might be considered hypercritical, but Proviso III to Article 2 introduces a fresh element of complication. Certain of the continental jurisdictions, notably that of France, have always regarded with the greatest jealousy any encroachments upon the protection afforded by their laws to persons who are treated as being *inopes consilii*. This view prevailed at the Conference, with the result that Proviso III enables the courts of any of the signatory Powers to refuse to recognize the validity of a signature by any of its nationals even though it would be held good by the application of the *lex loci contractus* to the matter by virtue of Proviso II to Article 2. Proviso III was perhaps contested with more depth of feeling than was shown in the case of any other of the proposals before the Conference. One of the delegates stigmatized it as sanctioning "international fraud". He illustrated his meaning by referring to the case of a French married woman who signs a bill of exchange in Italian territory. According to Article 2, apart from Proviso III, she would be liable. But if she is sued in a French court she would escape by virtue of that proviso to the article.

The objections to Article 2 of the Convention on Conflicts of Laws may be summarized as follows:

(1) If it was desired to give effect to the rule that capacity in the case of commercial contracts should be governed by the *lex loci contractus*, it would have been far better to do so expressly

rather than by the roundabout method adopted in Article 2 of the Convention. Legal acrobatics of this description will certainly not create a favourable impression on English and American men of business.

(2) Proviso III of Article 2, regarded from the point of view of unification, appears to be inadmissible. It reduces the apparent uniformity of law to a mere pretence. Under this proviso it is open to the courts of any country to refuse to give effect to the Convention as regards its nationals in any case in which the question of capacity is an issue.

(3) Article 2 makes no attempt to solve the very important question of the rules which should govern the capacity of corporations who have become parties to bills of exchange. The article deals solely with individual traders, and leaves the much more difficult question of the capacity of partnerships and incorporated companies entirely in the air. This is an important question, as certain countries recognize the doctrine of *ultra vires* whilst others do not.

(4) It is to be regretted that such controversial questions as the general application of the principle of nationality and the doctrine of renvoi have been imported into the Convention. No useful purpose appears to have been served by doing so, and the only result will probably be to arouse sentiments of suspicion and antagonism which it may be difficult to dispel hereafter. As I have endeavoured to show, the guiding principle, which was in fact accepted, was that of the application to capacity of the *lex loci contractus*, and it is a thousand pities that this simple and business-like solution of the problem has become embedded in a crust of highly controversial matter.

The next question which is dealt with in the Convention is that of Conflicts as to the form of Bills of Exchange and Promissory Notes. Article 3, which relates to this topic, runs as follows:

"The form of any contract arising out of a bill of exchange or promissory note is regulated by the laws of the territory in which the contract has been signed.

"(Proviso I) If however the obligations entered into by means of a bill of exchange or promissory note are not valid according to the provisions of the preceding paragraph, but are in conformity with the laws of the territory in which a subsequent contract has been entered into, the circumstance that the previous contracts are irregular in form does not invalidate the subsequent contract.

"(Proviso II) Each of the High Contracting Parties may prescribe that contracts by means of a bill of exchange and promissory note entered into abroad by one of its nationals shall be valid in respect of another of its nationals in its territory provided that they are in the form laid down by the national law."

This article is based on the principle of the application of the *lex loci contractus*, and, taken as a whole, it embodies a rule which would, no doubt, meet with general acceptance. The first proviso is somewhat obscure, but its object is very much the same as that of Section 72 (1) (*b*) of the Bills of Exchange Act, 1882. Let us suppose that a bill is drawn which by the *lex loci contractus* is invalid in point of form. It subsequently circulates in another country according to whose law it is valid in point of form. As between persons who become parties to the bill in the last-mentioned country, the bill is to be regarded as valid. If this is the correct interpretation to be placed on the proviso, it enacts a rule which conforms to the present state of the law in most countries, and accords with good sense and the requirements of commerce.

Proviso II to Article 3 was introduced at the instance of the German and Scandinavian delegations and represents a rule of the law of bills of exchange which is peculiar to those countries. It is best illustrated by an example. English law recognizes bills drawn in favour of bearer: French law regards them as invalid. *A*, an Englishman, issues a bearer bill in Paris, to *B*, a Frenchman, who negotiates it to *C*, another Englishman. According to English law, *C* cannot sue *A* in an English court because the bill was invalid by the *lex loci contractus*. But under Proviso II to the article, if *C* sues *A* in London, *C* would have a right of action because both the parties are before their national court, and the bill would be valid by their national law though not by the *lex loci contractus*. It should be pointed out that the proviso is permissive only and not obligatory, and in effect constitutes a reservation introduced into the Convention for the purpose of saving the law of those countries which follow the German system. In other words, it constitutes a departure from the principle of strict uniformity, which by many is regarded as of the essence of any convention which is intended to unify the various systems of Private International Law.

The obligations of the parties to bills of exchange and promissory notes are governed by Article 4, which runs as follows:

"Article 4: The effects of the obligations of the acceptor of a bill of exchange or maker of a promissory note are determined by the law of the place in which these instruments are payable.

"The effects of the signatures of the other parties liable on a bill of exchange or promissory note are determined by the law of the country in which is situated the place where the signatures were affixed."

This article does not appear to call for much comment. It is, to say the least of it, arguable that although the corresponding

provision of the Bills of Exchange Act, 1882[1] is different, in so far as the law applicable to acceptances in general is concerned, on its true construction it operates in the same way, where the case arises of a bill accepted in one country but payable in another.[2] The latter is the only case of importance, and it would therefore seem that, apart from any possible questions of legal terminology, there is nothing in Article 4 to which serious objection could be taken by an English lawyer.[3] The rights and duties of holders with regard to dishonoured bills or notes are dealt with in Articles 5 and 8 of the Convention, which are to the following effect:

"Article 5: The limits of time for the exercise of rights of recourse shall be determined for all signatories by the law of the place where the instrument was issued.

"Article 8: The form and the limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken."

The object of Article 5 is not altogether clear. It is apparently intended to meet a case in which the various parties liable on a bill can claim the benefit of different rules as to prescription or limitation of actions. Otherwise it would appear to be meaningless, as the time limits for such acts as protest or notice of dishonour are fixed by Article 8. If Article 5 serves any useful purpose—which appears to be doubtful—it is difficult to see why the law of the place of issue of the bill was selected as the criterion for the determination of liability in such cases. The law relating to prescription and to limitation of actions varies, no doubt, in the different countries, and a common rule is therefore desirable. A strong case can, however, be made out for the adoption of the *lex fori* as the law to be applied in this instance, because any rule which purports to unify Private International Law should, if possible, avoid the imposition on the trial court of a duty to investigate foreign law. The point is, however, not a vital one, as questions of prescription and limitation of actions can only arise very rarely in the case of negotiable instruments.

[1] Sect. 72 (2) of the Bills of Exchange Act, 1882.

[2] The point is too technical to be discussed here, but see the comments on the wording of Sect. 72 (2) of the Act in Chalmers on *Bills of Exchange* (9th ed.), at p. 282 and Dicey, *Conflict of Laws* (4th ed.), at p. 662.

[3] The proviso to Sect. 72 (2) of the Bills of Exchange Act, 1882 might perhaps create some difficulty, as Continental law does not distinguish between inland and foreign bills. The proviso has, however, been criticized somewhat severely in the only case in which it has been examined by an English court. See the comments of Pickford and Scrutton LL.JJ. in *Guaranty Trust* v. *Hannay* (1918) 2 K.B. at pp. 648 and 670.

Article 8 calls for no comment. It enacts a rule which is obviously just and convenient, and achieves the result aimed at by the corresponding provision of the Bills of Exchange Act, 1882 (Section 72 (3)) without the obscurity of the language of that Section.[1]

The remaining articles of the Convention do not call for detailed discussion. Article 9 applies to lost instruments the law of the country of payment, and this would seem to be in accordance with principle as well as being obviously the most convenient rule. Articles 6 and 7 are in effect reservations to the Convention, and were strongly opposed on this ground.

Article 6 provides that if a question arises as to whether the holder of a bill is to have a preferential right to any cover for the bill (*provision*),[2] the matter is to be determined by the law of the place of payment. Its operation is best explained by means of an illustration. Let us suppose that a bill is drawn by *A* in Sweden on a French bank in Paris, in favour of *C*, a domiciled Swede. *A* puts the French bank in funds to meet the bill. *C* endorses the bill to *D*, a domiciled Frenchman. On the day when the bill falls due, *A* is declared a bankrupt by the competent authority in Sweden. According to Swedish law the bank has to account to *A*'s estate in bankruptcy for the amount deposited to meet the bill. According to French law the bank must pay this amount over to *D*, the holder of the bill, even though this involves the preference of *D* to *A*'s creditors in general. The article would seem to be open to two objections. In the first place it constitutes a serious inroad into the bankruptcy laws of most countries, and further it seems possible that the introduction of this element into bankruptcy proceedings, may lead to complications in those countries where the concept of *provision* is unknown.

Article 7 leaves the question whether a partial acceptance or a partial payment of a bill can be refused by the holder to be determined by the law of the place of payment. It is sufficient to say that this is a question on which the attitude of English bankers and lawyers is adamant, and that it will be extremely difficult, if not impossible, to secure their consent to any rule which might compel them to accept part payment. It may perhaps be said that Article 7 places them in no worse position than they are at present, but the answer is that an important question of principle is at stake.

[1] See Westlake, *Private International Law* (7th ed.), ss. 231, and cf. Dicey, *Conflict of Laws* (4th ed.), p. 665.

[2] See note 2, p. 18.

Article 10 is somewhat difficult to explain. It runs as follows:

"Article 10: Each of the High Contracting Parties reserves to itself the right not to apply the principles of Private International Law contained in the present Convention so far as concerns (1) an obligation undertaken outside the territory of one of the High Contracting Parties, (2) any law which may be applicable in accordance with these principles, and which is not a law in force in the territory of any High Contracting Party."

The provisions of this article will operate in practice in the following way. *A* is a subject of Ruritania, a state which has signed and ratified the Convention. *B* is a subject of Utopia, a state which has not done so. *A* sues *B* on a bill of exchange in the Ruritanian courts. A situation may arise in which *B* may claim the application of the rules of the Convention to his case, on the ground that these rules are part of the law of Ruritania. He does so because the rules are more favourable to him than the pre-existing rules of Ruritanian Private International Law. Article 10 empowers the Ruritanian court to apply the old law in lieu of the rules of the Convention. The object of this is, of course, to place a certain amount of pressure on non-contracting states in order to induce them to adhere to the Convention.

In conclusion: the criticisms which have been advanced have not been put forward in any hostile spirit. Such defects as are to be found in the rules of Conflict of Laws contained in the Convention are to a considerable extent the result of the extremely unsatisfactory position occupied by Private International Law in the legal systems of the world. It is a branch of legal science which is comparatively recent in origin, and its rules must be regarded as largely in the making. The rules of English law with regard to the matter leave much to be desired. Section 72 of the Bills of Exchange Act, 1882, which deals with questions of conflict, is perhaps the least satisfactory feature of that admirable measure. Its phraseology is often ambiguous, and, in so far as the section purports to codify the law on the subject, it is patently incomplete.[1] It is significant that the American Uniform Negotiable Instruments Law, which is to a large extent a replica of the British Act, has omitted this section.

World-wide unification of the law of negotiable instruments cannot be regarded at present as a matter of practical politics, although the Geneva Uniform Law has undoubtedly brought the prospect very much nearer. But is this true of the unifica-

[1] See the criticism of Section 72 from the Canadian point of view in Falconbridge, *Banking and Negotiable Instruments* (4th ed.).

tion of the rules of Private International Law which relate to these instruments? The difficulties are no doubt great, and the task of unification may prove to be an arduous one. On the other hand it would be an immense gain to commerce if it could be carried through, and it is to be hoped that an attempt will be made, when the Geneva rules on Conflicts have been in operation for a sufficient time to enable the results to be appraised. The English-speaking countries will be compelled before long to put their own house in order on the question of Conflicts arising out of bills of exchange, and this may perhaps furnish the occasion for a reopening of the matter. The Geneva rules as a whole do not appear to be acceptable from the Anglo-American point of view, but some of them are not controversial and might well furnish the foundation on which a uniform system could be built up. It must, however, never be forgotten that the question is primarily one of commercial rather than juristic importance, and a bold policy is called for, which would brush aside such technicalities as the law of domicil and the doctrine of renvoi, and adopt the maxim *locus regit actum* as a guiding principle, supplemented where necessary by the application of the law of the place of payment. If this were done, most of the difficulties would probably disappear.

THE SO-CALLED ANGLO-AMERICAN AND CONTINENTAL SCHOOLS OF THOUGHT IN INTERNATIONAL LAW

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I

THE view that there exist in international law two different schools of thought, the Anglo-American and the Continental, is one which has gained wide acceptance in many countries, and in particular in Great Britain and in the United States. It has recently been given prominence in connexion with the question of obligatory arbitration and the justiciability of disputes. Thus it has been widely maintained in Great Britain that, as there exist on many vital questions of international law rival doctrines of these two schools of thought, to confer upon a permanent international tribunal jurisdiction in all questions of international law would amount to subjecting this country in advance to decisions of a tribunal the great majority of which is bred in and wedded to the Continental doctrine. This was, for instance, the view propounded by Lord Hailsham, the then Lord Chancellor, when replying, on May 1, 1929, in the House of Lords to a motion concerning the signature of the Optional Clause.[1] The view may be said to have found the support of some of the leading international lawyers in this country. Thus—to mention only some of the recent authorities—Professor Pearce Higgins, writing in 1929 in connexion with the Optional Clause, remarked that "it is well-known that on some questions of Prize Law there is a fundamental divergence between the views of the Anglo-American and the Continental Prize Courts, e.g., the meaning of 'enemy property'".[2] When writing two years before that date, he ascribed a much more fundamental character to the "divergence of outlook and method of treatment between lawyers of the Anglo-American school and those trained in the continental schools of law".[3] Sir John Fischer Williams has lent his support to a similar view of the "latent conflict between the Continental and the Anglo-Saxon conception of international law".[4] Professor Brierly has spoken generally of "a further cause of uncertainty peculiar to international law" which "lies in the

[1] *Parliamentary Debates, House of Lords*, 1929, Vol. 74, cols. 303, 304.

[2] *British Acceptance of Compulsory Arbitration under the "Optional Clause" and its Implications* (1929), p. 15.

[3] Quoted below, p. 46.

[4] Quoted below, p. 47.

persistence of two traditions, the Anglo-American and the Continental, which often assert conflicting rules on the same matter".[1]

What are these matters in which "conflicting rules" are "often" asserted by the "two traditions"? When writers refer to the difference between the Anglo-American and Continental conceptions of international law they may be referring to three different matters: they may mean that on certain specific subjects of international law of war or peace there is a definite cleavage of opinion, for instance, on the question of enemy property, or on the question of jurisdiction over foreign ships in national ports; or they may have in mind certain specific rules of municipal jurisprudence—like the doctrine of consideration, or the rules of evidence, or the doctrine of merger of previous negotiations in the contract—which are different on the Continent and in Anglo-American countries, and which may become relevant in the international sphere; or, finally, they may think of the general difference of approach and method underlying the two systems of municipal law and necessarily influencing the solution of any particular question put before an international court. It is proposed here to consider each of these three meanings of the supposed difference between the "two schools of thought". We say "supposed", for it will be submitted in the present article that the current statements on the alleged contrast between Anglo-American and Continental schools of thought in international law in any of the above meanings of the term find no support either in the existing rules of international law, or in the practice of international tribunals, or in the general jurisprudential considerations on which they profess to be based.

II

Differences between the "Two Schools of Thought" on Specific Matters of International Law.

The Law of Peace.—The most practical approach to an examination of this aspect of the question is to survey the whole field of international law, and to ascertain on what questions there exist differences of view and practice. Such a survey, when undertaken, shows that the whole international law of peace has produced only one doubtful instance of divergence of practice, namely, that relating to jurisdiction over foreign ships in national waters. Even this single individual divergence has been shown to be a

[1] *The Law of Nations* (1928), p. 55. See also *ibid.*, p. 189.

matter of form rather than of substance.[1] The lawyer surveying this part of international law will be impressed both by the large measure of uniformity with which its rules are understood and applied throughout the world and by the fact that such differences as exist, far from being reducible to a clash of Anglo-American and Continental ideas, owe their origin and preservation to altogether different reasons. Thus it has happened that in recent years the courts of some European countries, like France and Italy[2] (but not Germany), in estimating the right to jurisdictional immunities of diplomatic envoys or of public ships, have been inclined to attach importance to the question whether the activities in regard to which jurisdiction is invoked are of a public or private character, whereas British and American courts do not consider the character of the particular state activity as relevant.

Or, to give another example, it happens that English and American law does not assume jurisdiction over aliens in respect of crimes committed abroad, whereas the law of Italy, Turkey, China, and Mexico does. But the Anglo-American law is in this matter the same as that of Germany,[3] Spain, France, The Netherlands, and other countries, and it is therefore difficult to speak here of an Anglo-American view as distinguished from the Continental. How inappropriate are any generalizations in this field may be seen, in

[1] See Oppenheim, *International Law*, 4th ed. by McNair (1928), Vol. I, § 190 c. And see Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 115–92, who, after a detailed examination of the legislation and judicial practice of various countries, arrives at the conclusion that "as a matter of practice there seems to be little actual divergence between the action of American and British courts on the one hand and French and Italian courts on the other". As to the frequently quoted case of the *Amiral Hamelin* between Great Britain and France, both Jessup, *op. cit.*, p. 150, and Charteris in this *Year Book*, 1920–1, p. 83, point out that the attitude of the French Government in this case was not altogether consistent with some leading pronouncements of French courts in the matter. It will also be noted that the British-American attitude is shared by a number of Continental countries. Thus it appears that the courts of Soviet Russia claim jurisdiction in regard to disputes arising out of a contract of service on board a foreign vessel in a Soviet port. See the case *Reznikov* v. *Ships Arcos*, referred to in the Russian reply to the questionnaire sent in connexion with the proposed codification of international law in the matter of territorial waters; *League of Nations Document* C. 74 (b), M. 39 (b), 1929, V.

[2] But see the case of *Harrie Lurie* v. *Steinmann*, decided on January 26, 1927, by the Court of Rome, in which it was held that the rules of international law as to diplomatic immunities apply precisely to transactions made in the diplomatic person's private capacity, as his transactions in his public capacity are covered not by diplomatic immunities but by the much wider jurisdictional immunity of foreign states as such. See *Annual Digest*, 1927–8.

[3] In respect of crimes and offences as distinguished from contraventions, see the dissenting opinion of Judge Altamira in *The Lotus* case, *P.C.I.J.*, Series A., No. 10, pp. 100, 101, for a discussion of the law on the subject in various countries.

regard to the question of jurisdictional immunities of states, from the fact that whereas English and American courts have proceeded in this matter by way of a somewhat rigid logical deduction from the principle of the immunity of states from jurisdiction,[1] the Continental courts have differentiated in a practical manner between the various manifestations of state activity—a rather startling gloss on the view, stressed by the upholders of the doctrine of "two schools of thought", that it is Continental law which proceeds by way of methodical elaboration of abstract principles in contradistinction to the more practical approach of Common Law courts.[2] Differences of this nature are not even the result of conflicting interests, as is, for instance, the case in regard to the divergence of views on the questions of state responsibility in cases in which there is no discrimination between the national and the alien, or on the matter of the extent of territorial waters.

The Law of War.—A more substantial reason for the current assumption of a difference between the Anglo-American and Continental conceptions of international law lies in the divergences of opinion and practice in regard to the rules of warfare. It must be admitted that in regard to the laws of war there existed before 1914 a marked divergence of theory and practice on a considerable number of points, although even here the views of Great Britain and the United States were frequently shared by several other states. Some of these differences had reference to matters of minor importance. Thus, for instance, according to the British and American (and also Japanese) practice, a blockade-breaking vessel was liable to seizure when the master had actual or constructive knowledge of the blockade; while according to the Continental view only an actual attempt to break the line of blockade justified the infliction of punishment. English and American practice was ready to assume that a breach of blockade had been committed when a vessel which, according to her papers, was not

[1] See, for instance, the reasoning of the Supreme Court of the United States in *Berizzi Brothers* v. *Steamship "Pesaro"*, 271 U.S. 562, and *Annual Digest*, 1925–6, Case No. 135.

[2] The writer thought for a time that this divergence might perhaps be due to the attitude of Anglo-American law as expressed in the immunity of the Crown (or, in the United States, of the Government) from suit, and to the application of this principle to foreign states. However, the fact that German courts, where the civil responsibility of the governmental agencies in internal law is a recognized principle, follow the practice of English and American courts shows that there is no connexion between the two sets of facts. See *The Ice King* case, finally decided on December 10, 1921, by the German Reichsgericht and discussed by Feine in Strupp, *Wörterbuch des Völkerrechts*, I, p. 543. See also Garner in *British Year Book of International Law*, 1925, pp. 133 ff.

destined for the blockaded port, was found near it and steering to it; while more direct evidence of the intention to break the blockade was necessary according to Continental opinion. Views differed as to the penalty for the breach of blockade, as to the determination of the destination of contraband goods, as to the penalty for carrying contraband, as to rules governing the transfer of merchant vessels to a neutral flag, and on many other matters. In the course of the World War most of these differences shrank into insignificance as the result of the wide application of reprisals, and of those two radical levellers of divergences, the doctrine of continuous voyage and the extension of the list of contraband goods. Whereas the policy of reprisals may, at least theoretically, be regarded as having been dictated by special circumstances of the war of 1914–18, the wide and uniform application of the doctrine of continuous voyage and the inclusion of nearly all the principal foodstuffs and commodities in the list of absolute contraband were a manifestation of the lasting change which has occurred in the character of modern warfare. This change in the nature of war, which has ceased to be a mere trial of strength of the combatant forces *stricto sensu*—a change which is new and fundamental notwithstanding the fact that a similar development has been asserted to have taken place during the Napoleonic wars[1]—has deprived most, if not all, divergences between the Anglo-American and Continental doctrines of any but historical importance.

This change has decidedly influenced, to the point of obliterating it, that aspect of the difference between the "two schools of thought" which is connected with the question of the subjects of the relation of war. When, in February 1928, a bill was passed by the French Parliament which provided for the conscription of the entire man power in time of war, the reason for it being—to quote the words of the *rapporteur* to the Senate—that the efforts of nations in modern war "can no longer be limited to the action of armed forces, but that they must be ready to throw into the battle . . . the totality of their forces and their resources",[2] this law, passed as it was in a country in which, through the resounding maxims of Rousseau and Portalis, the Continental doctrine of the state as the sole subject of the relation of war found its clearest expression, was only a logical consummation of the abandonment of a theory which had become utterly divorced from the realities of modern warfare. The actual change had begun long before the

[1] See Moore, *International Law and Some Current Illusions* (1924), p. 27.

[2] Quoted from Toynbee, *Survey of International Affairs*, 1927 (1929), p. 3.

World War. No account of it was taken in the numerous provisions of the Hague Conventions conceived in the atmosphere of unreality which surrounded much of the work of the Hague Conferences. But there is little doubt that this aspect of the distinction between the Continental and Anglo-American schools of thought—and it was the principal subject of the distinction, most of the others being mainly its derivatives—has now become a thing of the past. It was virtually abandoned by the Continental countries, in all relevant matters, in their practice during the World War. Thus in France and Germany the inviolability of private enemy property on land survived in name only under the cumulative impact of the policy of sequestration, frequently amounting to liquidation, and of reprisals.

The question of "enemy character of private property" may be mentioned as another concrete example of the fate which has befallen the difference between the "two schools". This subject has, as we have seen, been recently described by a leading British authority as still constituting a substantial point of difference between the Anglo-American and Continental views. Undoubtedly, there existed before the War a cleavage of opinion on this matter. While Great Britain, the United States, Japan, The Netherlands, and Spain insisted that both nationality and domicil must be taken into consideration for the purpose of determining enemy character, France, Germany, Austria-Hungary, Italy, and Russia made the character of goods dependent upon the sole test of the nationality of the owner. Article 58 of the Declaration of London was in effect limited to a statement of this disagreement.[1] However, whereas, in view of the character of the measures adopted by Great Britain by way of reprisals and otherwise, the question of enemy character lost much of its importance in relation to liability to capture, it remained important in regard to municipal legislation concerning trading with the enemy. It was in this respect that both France and Great Britain, the representative countries of the "two schools", abandoned their respective positions held before the War, and cumulated the two tests. France, in September 1914, forbade *inter alia* trade with non-enemy subjects residing in an enemy country. British legislation applied the prohibition to, among others, persons of enemy nationality or enemy association.[2]

[1] It provided that "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner".

[2] See Garner, *Prize Law* (1927), pp. 433 ff., and the same, *International Law and the World War* (1920), Vol. I, § 155.

Legislation concerning trading with the enemy is essentially a question of municipal law, but it is not without a bearing on the question of enemy property as a whole. This may be seen from a passage, which may be usefully quoted here, in a communication addressed in this matter in October 1916, by Sir Edward Grey to the American Ambassador in London:

"As the United States Government are well aware, the Anglo-American practice has in times past been to treat domicil as the test of enemy character, in contradistinction to the continental practice, which has always regarded nationality as the test. The Anglo-American rule crystallized at the time when means of transport and communication were less developed than now, and when in consequence the actions of a person established in a distant country could have but little influence upon a struggle. To-day the position is very different."[1]

It is submitted that whereas the view as to the existence of two schools of thought on definite subjects in international law has never been in accordance with facts so far as the international law of peace is concerned, in regard to the international law of war it has ceased to be so and has become a matter of history. In so far as it subsists in minor details, it has become unreal when compared with major developments which have taken place.

III

Anglo-American and Continental Rules and Doctrines of Municipal Law of Possible Relevance in International Law.

Questions of Municipal Law before International Tribunals.— It might be maintained that whatever may be the fate of the doctrine of "two schools of international law" in regard to discrepancies of view on individual questions of international law of peace and war, there are nevertheless situations possible in which differences in the municipal law of the two groups of countries may prove of importance for the decision of international questions. Thus, Common Law rules of evidence differ substantially from those adopted in the countries whose legal systems are based on Roman law; and it is argued that, as the large majority of judges on permanent international tribunals like the Permanent Court of International Justice are trained in the Roman law systems of law, the probability is that they would tend to apply the rules of evidence obtaining in their own legal systems and disregard those applied by Common Law courts. The same applies to the question,

[1] *American Journal of International Law*, Supp., XI (1917), p. 45.

which is partly one of evidence, of the admissibility of so-called preparatory work and of the consideration of negotiations as an element in the interpretation of treaties. The same difficulty is said to occur in regard to the question of nationality, inasmuch as in some countries the *jus soli* plays a decisive part in determining nationality, whereas in others the emphasis rests on the *jus sanguinis*. In general the problem may also be said to arise whenever an international tribunal is called upon to decide a question of private law in regard to which the two systems of law differ.

The first observation that ought to be made in connexion with this class of case is that its application is of limited scope. The fact that the rules of municipal law in one group of states differ from those in another group is on the whole irrelevant for the purposes of international law. International law is not concerned with matters of municipal law; it is concerned with relations between states. This does not mean that international tribunals are not on occasions called upon to determine matters of municipal law. Frequently, in particular in regard to disputes arising out of claims of private individuals, they are called upon to decide, as a question of private international law, which municipal law is applicable, or even, in some cases, to interpret and to apply a rule of municipal law. Thus, for instance, in the case concerning the payment of various Serbian loans issued in France, the Permanent Court had to determine whether the obligations entered into by Serbia were governed by Serbian or French law, and also what law governed the question of the currency in which the payment must or might be made in France.[1] In nearly every case in which the responsibility of the state is claimed to be engaged on account of denial of justice, international tribunals are called upon to review the application of municipal law.[2] But there is in fact in such cases no question of international tribunals having to choose between two rules of international law, the choice between which may be influenced by the fact that some judges are trained in one system of law and the others in another. The question in such cases is, to put it at its highest, one substantially of private international law, and, after this question has been decided, of

[1] See Judgment No. 14, Series A, No. 20.

[2] The detailed judgment of December 30, 1896, of the President of the Swiss Confederation in the *Fabiani* case between France and Venezuela (Lafontaine, *Pasicrisie Internationale* (1902), pp. 344–68) is a good illustration of this type of case. See also *P.C.I.J.*, Judgment No. 7, Series A, No. 7, pp. 19, 42, on the consideration of municipal law by the Court, and *Georges Pinson* Case, *Annual Digest*, 1927–8.

applying the relevant rule of municipal law as chosen in accordance with a rule of private international law.[1] Thus in the above-mentioned case of the Serbian loans, the Court, after having decided that French law was to govern the question of currency, proceeded to decide the meaning and scope of the relevant French law by reference to French legislation and to French judicial decisions interpreting that legislation.[2]

The position is essentially the same in regard to those numerous cases in which treaties include disputed terms of municipal law,[3] for instance when a number of treaties concluded by Japan contained a provision to the effect that subjects of certain European Powers should enjoy freedom from taxation in respect of *leases in perpetuity* held by them.[4,5] The question in such cases is not that of determining the content of the disputed term by its direct interpretation in a manner which may be influenced by the Anglo-American or Continental law conceptions of the judges. The problem in such cases is to find, by reference to the intention of the parties, which of the two systems of municipal law represented by the contracting parties is applicable for the determination of rights and duties involved, and then to decide the dispute by the application of that particular municipal law. In a great number of cases the conventions remove, by giving a clear definition of the relevant conceptions of municipal law, any doubts as to the law to be applied. In particular, in conventions of a technical character and in arbitration treaties, there may be found a long list of definitions similar to those encountered in British Acts of Parliament. In other cases the conventions refer to the law of the state within which the relevant legal event takes place, or, as is often done in

[1] It is, of course, possible that the rules of international private law in the states which are parties to the dispute are in conflict, in which case an international court may have either to choose between them or to proceed to apply a kind of supernational international private law. See on this matter Zitelmann, *Internationales Privatrecht*, Vol. I, pp. 19 ff.

[2] *Op. cit.*, pp. 46 ff. And see, in general, on the application of local legislation, Ralston, *The Law and Procedure of International Tribunals* (1926), Nos. 146–7, 255–9.

[3] See on this subject the scholarly article of Ruegger in *Zeitschrift für internationales Recht*, XXVIII (1919–20), pp. 426–502.

[4] See below, p. 40.

[5] Such questions do not occur in connexion with the interpretation of treaties only. Thus, for instance, in the *Casablanca* case, decided by the Permanent Court of Arbitration, Germany maintained that the contract of service of the German members of the Foreign Legion was a private law contract which, according to German law, i.e. § 1381 of the Civil Code, was contrary to good morals and, as such, invalid, whereas France contended that it was a contract of public law and, as such, valid in all places, including foreign occupied territory, in which the Legion was present. See French *Contre-Mémoire*, pp. 25 ff.

extradition treaties, to provisions common to the law of both contracting parties. Frequently, the choice of the *termini technici* shows which law the parties wish to be applied, for instance, when the treaty refers to "wakufs" of Ottoman law.[1] But even when no such express reference to a definite source is available, it is not the unhampered discretion of judges which decides which law is applicable, but general rules like the one that relations affecting immovable property are governed by the law of the country within which it is situated; or by reference to the principle that the treaty should be interpreted with a close approximation to the legal system of the country within which it takes effect; or, finally, by reference to the most general and overriding principle that effect is to be given to the intention of the parties. Thus in the *Japanese House Tax* case, the Permanent Court of Arbitration refused to discuss by reference to "principles of civil law" the question whether the leased properties referred to in the treaties between Japan and the European Powers included buildings erected on land or were confined to the land alone;[2] it based its decision on the manifestations of the intention of the parties to these treaties. Even municipal courts when interpreting treaty provisions are reluctant to have recourse to rules of interpretation and legal doctrines peculiar to their own country and not having a sufficient degree of generality, such as—in the case of English or American courts—the doctrine of *cy-près*[3] or the doctrine of an equity of redemption outstanding in the mortgagor.[4]

It is true that, apart from these cases of determining subjective rights and obligations grounded in definite conceptions of municipal law, international tribunals are frequently confronted with questions of international law proper which, by virtue of their analogy to corresponding situations in private law, may be deemed to raise the dilemma of a choice between two systems of

[1] See, e.g. Article 12 of the Berlin Act of July 13, 1878, Martens, *N.R.G.*, 2 ser., III, p. 449, and other examples cited by Ruegger, *op. cit.*, p. 477, n. 93.

[2] Japan denied the applicability of the common and civil law principle of accession, according to which the buildings shared the legal position of the land on which they were erected, and appealed to the old Japanese custom of dualism of land and building. See *Japanese Statement of Objections*, p. 43, and *Reply to Objections*, p. 23.

[3] *The Amiable Isabella*, 6 Wheaton 1.

[4] *Josef Inwald Actien Gesellschaft* v. *Pfeiffer and another*, 43 *Times Law Reports*, p. 399, and *Annual Digest*, 1927–8. And see *Adams* v. *Akerlund*, 168 *Ill.* 632, 48 *N.E.* 454 (cited by Moore, *Digest*, V, p. 255) for an even more striking example of an American court interpreting a treaty between the United States and Sweden by holding that the term "effects" should be interpreted by having regard to the fact that it was represented in the French draft of the Treaty by the word "*biens*", which, in civil law, includes immovables as well as movables.

law and of a possible preponderant influence of one of them. Such situations do necessarily arise in international law,[1] but, by the very nature of these relations, the rules governing them cannot be rules of municipal law. They are created and applied having regard to the necessities of international life and to the general principles of law which underlie them, although it may happen that the rule of international law finally adopted will approximate or even be identical in form[2] or in substance with a rule of law as adopted by a particular municipal system of law. So long as the rule thus adopted is known in advance and so long as an international tribunal does not arbitrarily give preference to one set of rules, it does not matter which is ultimately established as a rule of international law. There is no inherent and absolute merit in any particular rule of national municipal law such as to make its incorporation in international law a matter of national interest or honour.

Anglo-American and Continental Rules of Evidence.—The question of rules of evidence applied by international tribunals shows not only that this aspect of the problem causes little difficulty, but also that international judicial settlement may be relied upon to produce, independently of any particular system of law, rules appropriate to its own requirements and circumstances. Thus, the history of international arbitration shows that whatever may be the merits of the strict Common Law rules regulating the admissibility of evidence and of burden of proof, it is not practicable to follow them in international litigation. They are not followed there; in fact, they have been expressly repudiated. There are therefore in this matter no longer two schools of thought in international law; there is one rule of international law on the subject, which, as it happens, does not coincide with that which Common Law courts apply in actions brought before them. No particular national interest, including national self-esteem, is thereby injured. For the practice of international tribunals in this matter is known and established, and consequently no legitimate expectations are disappointed. In fact, as we shall see, this

[1] See Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), *passim*.

[2] Thus, for instance, the Common Law rule of estoppel is frequently applied by international tribunals (see Lauterpacht, *op. cit.*, §§ 87, 88), and it appears that the Permanent Court in the *Serbian Loans* case (Judgment No. 14, Series A, No. 20, p. 38) considered the argument as to estoppel on its merits. But the doctrine of estoppel is only in form a Common Law doctrine. It has its roots in Roman law (see Riezler, *Venire contra factum suum* (1912)), and some of its elements will be found, e.g., in Articles 307–9 of the German Code and 1350–2 of the *Code Civil*.

practice was adopted with approval by English and American judges acting as international arbitrators; it has not been opposed by Great Britain or the United States when appearing as parties. As to the inherent merits of the present Common Law rules of evidence, it may be sufficient to say that many English lawyers of authority are of the opinion that there is little rational justification for their complexities and technicalities; that they are an undesirable remnant of the formalism of the older law of pleading; and that any system which trammels judicial discretion in the admission or exclusion of evidence may not be beneficial to the purposes of justice.[1]

Apart from the rules of permanent tribunals like the Permanent Court of Arbitration or the Permanent Court of International Justice, no specific rules as to evidence and proof have so far evolved in international arbitration. But there has been a general tendency, sanctioned by a long series of arbitral pronouncements, to disregard elaborate restrictions upon the admissibility of evidence and to accept the principle that no evidence should be excluded *a limine* and that it should be left to the judge to appreciate the weight and persuasiveness of the evidence put before him. This tendency has been given emphatic expression in the *Parker* case decided in March, 1926, by the American-Mexican Mixed Claims Commission, where the Commissioners expressly refused to be bound by restrictive and purely technical rules of proof and evidence.[2] The same view was expressed by Professor Huber, acting as the sole arbitrator in the Island of Palmas Arbitration between the United States and Holland. The United States contended that statements without evidence to support them cannot be taken into consideration by an international arbitrator, and that evidence is not only to be referred to but is also to be laid before the tribunal. One of the Dutch contentions was that statements made by a government in regard to its own acts are evidence in themselves and have no need of supplementary

[1] See Sir John Salmond in his Introduction to the *Science of Legal Method* in the *Modern Legal Philosophy Series* (1921), p. lxxviii: "There is no other form of human inquiry in which the inquirer is not at liberty to seek guidance from any source which seems good and sufficient to him. Why then should the inquiries of courts of justice be conducted on any different principle?" And see Admiralty Short Cause Rules, 1908, according to which the parties may agree that the Judge shall be at liberty to receive, call for, or act upon, such evidence, whether legally admissible or not, as he may think fit. *The Annual Practice*, 1931, p. 2404. And see *ibid.*, p. 2402, the Commercial Causes Notice of 1895.

[2] *American Journal of International Law*, XXI (1927), p. 174; *Opinions of Commissioners*, 1927, p. 35; *Annual Digest*, 1925–6, Case No. 315.

corroboration. The arbitrator dealt in detail with these contentions,[1] which he rejected. He pointed out that it would be "contrary to the broad principles applied in international arbitrations to exclude *a limine*, except under the explicit terms of a conventional rule, every allegation made by a party as irrelevant if it is not supported by evidence", that "it is for the arbitrator to decide both whether allegations do or . . . do not need evidence in support and whether the evidence produced is sufficient or not", and that "such liberty of weighing the merits of the evidence produced is essential to the arbitrator". These pronouncements, referring as they do to established arbitral practice, are in fact in keeping with the emphatic views expressed on this subject by a long series of arbitrators—most of whom came from England or America.[2]

Preparatory Work as an Element of Interpretation of Treaties.—The question of recourse to preliminary negotiations for the purpose of interpreting treaty provisions is in a sense a question of evidence. It has recently become a matter of special interest in connexion with the circumstances accompanying the signature and ratification of the Paris Pact for the Renunciation of War. It is particularly in this connexion that it has been adduced as yet another instance of the diversity of Anglo-American and Continental methods. Thus it is contended that, whereas Continental law favours the interpretation of treaties by recourse to preliminary negotiations, such interpretation is contrary to a clear Common Law rule of interpretation. Reasons of space do not allow of a detailed consideration of this aspect of the doctrine of two schools of thought, but it is submitted that such an examination, if undertaken, would show that the doctrine has found no support in the attitude adopted by Great Britain or the United States when appearing as parties before international tribunals;[3] that, what-

[1] See pp. 19, 20, of the original award, and *Annual Digest*, 1927–8. See also, *ibid.*, the *Georges Pinson Case*.

[2] See, for instance, the *Pelletier* case, Moore, p. 1752; the *Lasry* case, in Ralston, *Venezuelan Arbitrations*, p. 38; the *Faber* case, *ibid.*, p. 602 and the authorities there cited on pp. 600 and 601.

[3] See, for instance, as to the dispute concerning the interpretation of the Treaty of Ghent and the award of 1822, Moore, pp. 352–6; as to the Behring Sea Arbitration, see *Argument of Great Britain*, U.S. No. 4 (1893) Cd.—6921 p. 19; *Counter-Case of Great Britain*, U.S. No. 3 (1893) Cd.—6920 p. 27; and see the *Case of the United States*, U.S. No. 6 (1893) Cd.—6949 p. 53; as to the North Atlantic Fisheries Arbitration, see pp. 163, 166, 177, 184, and 190 of the award as printed in Scott, *Hague Court Reports*; as to the Alaskan Boundary Dispute, see Argument of Mr. Christopher Robinson, *Proceedings of the Alaskan Boundary Tribunal*, U.S. Senate Doc. No. 162, 58th Congress, 2nd Session, p. 502; *ibid.*, pp. 503, 507, 557.

With this should, for instance, be contrasted the attitude of France questioning before

ever may be the law in the matter of interpretation of statutes and contracts, it is not shared by the courts of these countries in regard to interpretation of treaties;[1] and that it is unknown to the practice of international tribunals which, far from assimilating treaties to either statutes or contracts, attaches considerable although merely corroborative importance to negotiations preceding the conclusion of treaties.[2] The consideration of preparatory work is

the Permanent Court of International Justice the admissibility of this means of interpretation in the case concerning the competence of the International Labour Organization in regard to international regulation of the conditions of labour of persons employed in agriculture (Advisory Opinion No. 2). See Additional Observations of Professor de Lapradelle, Series C, No. 1, p. 187. See, in addition to three British-American arbitrations referred to above, the *Kummerow* and *Aroa Mines* cases, *Venezuelan Arbitrations*, Ralston's *Report*, pp. 526 and 358; the award of the Swiss Federal Council of December 1, 1900, in the boundary dispute between France and Switzerland concerning French Guiana, Lafontaine, *op. cit.*, p. 573; the awards of the Permanent Court of Arbitration in *Japanese House Tax* and *Venezuelan Preferential Claims* cases, Scott, *Hague Court Reports*, pp. 83 and 66 respectively. The recourse to preparatory work by the Mixed Arbitral Tribunals established by the Peace Treaties of 1919 and by the Treaty of Lausanne has constituted a constant feature of their activities. See *Annual Digest*, 1927–8, for numerous references.

[1] See *The Jeanne, Br. and Col. Prize Cases*, Vol. II, p. 302, in which Sir Samuel Evans relied on the deliberations of the London Conference of 1908 and 1909; *The Lucia, ibid.*, Vol. I, p. 226; *Porter* v. *Freudenberg*, [1915] 1 K.B. at p. 876, in which the Court of Appeal, while regarding the text of the relevant Hague Convention as decisive, devoted a passage to the consideration of the changes made in the original draft. And see the British Order in Council of August 20, 1914, adopting the general report of the drafting committee of the Conference as an authoritative statement of the meaning and of the intention of the Declaration of London. On the other hand—and this again is an interesting gloss on the alleged difference between the English and Continental practices—the French *Conseil d'Etat* repeatedly refused to accept the report of the drafting committee as an authoritative interpretation of the Declaration. See *The Federico*, Fauchille, *Jurisprudence française en matière des Prises maritimes*, p. 287, and Garner, *op. cit.*, Sections, 115, 449.

As to the practice in the United States, see the recent case, 279 U.S. 46, decided by the Supreme Court on February 18, 1929, of *Nielsen* v. *Johnson*, in which it was held that "recourse may be had to the negotiations and diplomatic correspondence of the contracting parties". See on this case Hyde in *American Journal of International Law*, XXIII (1929), pp. 826–8; the case is also printed, *ibid.*, p. 422.

[2] The study of the work of the Permanent Court seems to justify the submission that, although there is no occasion to have recourse to preparatory work when the meaning of the treaty is clear, the Court will not refuse to consider previous negotiations for the purpose of dispelling and answering such doubts as have been raised by either of the parties by reference to such preparatory work. See, for instance, Series A, No. 2, p. 24 (*The Mavrommatis Palestine Concessions*); Series A, No, 10. pp. 16 and 17 (*The Lotus case*); Series B, No. 10, p. 22 (*Exchange of Greek and Turkish Populations*); Series B, No. 12, pp. 19, 22, 23 (*Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne*); Series B, No. 14, pp. 28–31 (*Jurisdiction of the European Commission of the Danube*). And see in particular the recent judgments, in the form of Orders, in the French-Swiss Free Zones dispute. In the Order of August 19, 1929 (Series A, No. 22, p. 21), the Court stated that its view was "corroborated by the facts relating to the drafting of Article 435 of the Treaty of Versailles"; in the Order of December 6, 1930 (Series A, No. 24, p. 11),

only in exceptional cases essential for the purpose of interpretation. International tribunals are amply served by the ordinary rules and methods of interpretation, and their preoccupation with the question of preliminary negotiations is mainly due to the abundance of forensic argument in the matter.

Nationality.—The subject of the frequently alleged difference between the Common Law and Continental law principles in the matter of nationality requires only very brief mention. The question is not a matter of international law, the determination of nationality being, subject to the existing international obligations of the state, left to its municipal law. Apart from this, however, the difference between the *jus soli* and *jus sanguinis* is, of course, not one between the Anglo-American and Continental conceptions of law. It was only after the beginning of the nineteenth century that, following upon the example of the *Code Napoléon*, the *jus soli* was replaced by the *jus sanguinis*. At present there is no state in existence whose law is based solely on the *jus soli*. The predominant rule is a combination of the two systems; the difference is one of emphasis. It appears that in over twenty states the law is based principally upon *jus sanguinis* and partly upon *jus soli*, while in about an equal number of states the emphasis is reversed. Great Britain and the United States belong to the latter group. To speak here of a manifestation of a difference between the Anglo-American and Continental conceptions is to use a phrase which, if it is not meaningless, is inaccurate. In so far as the question assumes an international aspect, that is, when there is a conflict of nationalities, international tribunals tend to evolve a rule of international law which, differing in its formulation from each of the systems of municipal law, is based on the criterion of effective nationality.[1]

it again relied on "the history of the negotiations which have taken place between the Parties with a view to concluding the agreement provided for by Article 435, paragraph 2, of the Treaty of Versailles". This reluctance of the Court to commit itself to an elimination of preparatory work is emphasized by its refusal to consider it in some specific sets of cases, for instance, when reference is made to confidential negotiations (Series B, No. 14, p. 32), or to negotiations in which one or more of the parties to the dispute did not participate (Series A, No. 16, p. 8, and Annex 3, pp. 41, 42), or when conclusions are being drawn from offers and declarations made in the course of abortive negotiations (Series A, No. 17, p. 51).

[1] See the case of *Baron Frédéric de Born* v. *Yugoslav State*, in which the tribunal considered that when a person was entitled to claim one nationality in one country and another nationality in another country "it was the duty of the Tribunal to examine in which of the two countries existed the elements essential in law and in fact for the purpose of creating an effective link of nationality, and not merely a theoretical one" and that in solving the conflict of nationalities the Tribunal ought to consider where the

IV

General Differences in Legal Approach and Legal Philosophy.

The Continental and Anglo-American Legal Traditions.—It has been submitted in the preceding sections that there is no substance in the doctrine of "two schools of thought" from the point of view either of differences on specific questions of international law or of discrepancies in rules of municipal law in so far as they may become relevant in the field of international law. The opinion is, however, widely held that, apart from any such specific differences, there still remains a substantial divergence in the domain of legal philosophy and in the juridical method and approach, which, it is said, are the consequence of a fundamental difference in legal thinking and jurisprudence between the Common Law and Continental countries. It is pointed out that this difference in legal upbringing and outlook may not only become of importance when international judges are called upon to have recourse to general principles of law, as envisaged, for instance, in Article 38 of the Statute of the Permanent Court, but also that it may exercise an influence on the manner of deciding any question of international law put before them. A comprehensive statement of these fundamental differences, in relation to international law, was made by Professor Pearce Higgins, and it may therefore be useful to quote part of it:

"In dealing with questions of International Law it will be found that the systems of law in which men have been trained and under which they live exercise a very marked influence on their outlook and methods of treatment. It is not sufficiently realized even by lawyers, much less by the mass of mankind, how much their outlook on all matters involving legal principles and methods is influenced by the legal atmosphere in which their special national civilization has developed. There is a marked divergence of outlook and method of treatment between lawyers of the Anglo-American school and those trained in the continental schools of law. The former are in the habit of dealing with facts by the aid of principles extracted from a long series of cases decided by their courts administering the Common Law or that branch of law which originally came into being to modify its too great rigidity and to which the name of Equity is applied in England and the United States. The states of the continent of Europe and the peoples of the New World who derive their jurisprudence from them, have been brought up under the system of codified rules of law, primarily those of the Roman Law, and in more recent times the codes which they have respectively enacted. France, Germany, Switzerland, Italy, and Austria, to name a few of

claimant was domiciled, where he conducted his business, and where he exercised his political rights. (*Annual Digest*, 1925–6, Case No. 205). See also the case of *Barthez de Montfort* v. *Treuhänder Hauptverwaltung* (*Ibid.*, Case No. 206), in which the Franco-German Mixed Arbitral Tribunal applied the doctrine of active nationality *eo nomine*.

such states, are in this position, and the tendency of such peoples is to seek for clear-cut definitions and concise statements in the code for the guidance of judge and people."[1]

We find, even more recently, Sir John Fischer Williams giving expression to the same view. He speaks of premature or ambitious attempts at codification as likely to raise "the latent conflict between the Continental and the Anglo-Saxon conception of international law, between the conception, that is, of law as a complete structure of right and justice legally ordered and commanded by authority, the high idea incorporate, and the conception of law as the slow elaboration of custom, the gradual adjustment of things to the demands of practical reason, the interpretation and the rationalization of the fact".[2] This particular approach to the supposed divergence between the Continental and Anglo-American conceptions of international law is widespread, frequently voiced, and received with a respect which is somewhat out of keeping with the distrust with which the English lawyer is inclined to confront general statements of an abstract nature.

There is, so far as the writer is aware, in English or American literature, no comprehensive presentation of the supposed fundamental difference between the Anglo-American and Continental jurisprudence and legal philosophy as distinguished from the difference in individual legal rules or doctrines.[3] There are mainly general references and vague statements on the subject. Thus the student will find a report of Austin commenting upon the rigour and abstract character of his own exposition by saying that he

[1] *International Law and Relations* (1928), pp. 30, 31.

[2] *Chapters on Current International Law and the League of Nations* (1929), p. 58. Sir John Fischer Williams makes this statement while discussing the attitude of the two countries on the matter of codification. Reasons of space do not permit of an examination of this aspect of the "two schools of thought", but perhaps Austin's 39th lecture, which is a powerful plea for codification as against some Continental arguments against it, will suggest the drawbacks of broad generalizations also in regard to this particular matter. See also, to the same effect, Keith in Wheaton's *International Law*, 6th ed. (1929), Vol. I, p. 34.

[3] For some aspects of the matter see Pound in *Harvard Law Review*, XXXVI (1922–3), pp. 645–52. There is also a remarkable dearth of presentations of the individual differences on a comparative basis. However, Kuhn's *Grundzüge des Englisch-Amerikanischen Privat- und Prozessrechts, besonders im Vergleiche mit den Systemen des europäischen Kontinents* (1915), will be found useful. See also Walton, the *Egyptian Law of Obligations* (2nd ed., 1920), 2 vols., which is an admirable commentary on the differences, so far as this part of the law is concerned, between the *Code Civil* and the Common Law. And see Anglin in *The Canadian Law Review* I (1923), pp. 33 ff.; Mignault, *ibid.*, III (1925), pp. 1 *et seq.*; Rinfret, *ibid.*, IV (1926), pp. 68 *et seq.*; Laverty, *ibid.*, IX (1931), pp. 13 *et seq.*

ought to have become a German professor.[1] He will read Salmond's warning that the reader who ventures into the region of continental legal philosophy will find himself "a stranger in a strange land, where men speak to him in an unknown tongue".[2] As a rule his attention will be drawn to the difficulties and the dangers of the confusion resulting from the fact that on the Continent the term law (*Recht, droit, diritto*) covers not only positive law properly so-called, but also ideas of right and justice, whereas the English term "law" "means law and nothing else".[3] It is pointed out to him that this difference in terminology is expressive of a difference in legal method consisting in the fact that the Anglo-Saxon approach is more realistic and pragmatic; and that, being concerned with what the law is and not with what it ought to be, it is pervaded by a scientific unity lacking in the Continental presentation and treatment of the law which, it is said, constantly confuses the idea of law with the idea of right. This inclination to abstract reasoning and logical deduction from general principles obtaining on the Continent is regarded both as the cause and the effect of the absence of judge-made case law as expressed in England and America in the binding force of judicial precedent as a source of law. It is this last feature of Anglo-American law which has impressed itself most upon the minds of international lawyers not only in this country, but also on the Continent, where there has otherwise been no such pronounced tendency to insist on the existence of fundamental differences between the two schools of thought.[4] The scope of this article neither permits nor calls for

[1] See the Preface (of 1861) of Sarah Austin to *Lectures on Jurisprudence*, ed. by Campbell (1911), Vol. I, p. 12.

[2] *Jurisprudence*, § 4.

[3] See Salmond, *loc. cit.*; Holland, *Jurisprudence*, 6th ed. (1893), p. 13, according to whom the continental *Recht* or *droit* covers law, rights, and justice; Fischer Williams, *op. cit.*, p. 16.

[4] Another supposed peculiarity of the Common Law which has attracted the attention of continental international lawyers is English equity as representing the broad, humane, and generous approach to and application of rules of law. Thus Professor Anzilotti, at that time President of the Permanent Court of International Justice, when paying a tribute to the memory of Lord Finlay, and when reviewing the contribution which Lord Finlay made to the work of the Court, said:

"... What Lord Finlay truly represented in this Court, as it was his duty to do, was the legal system in which he was brought up. It is in particular thanks to him that certain principles and institutions of Anglo-Saxon law, particularly as regards procedure, which seem best destined to meet the requirements of international justice have, with the appropriate limitations and modifications, found a place in the Rules of Court. And there is no need to add that in the course of the sometimes difficult tasks which we have to fulfil, he never failed to help us with those ideas of flexibility and of equity which are the basis and almost the life-breath of the English legal system

any systematic attempt at an examination of the major aspects of the differences between Anglo-American and Continental jurisprudence and legal philosophy. It is therefore intended to limit this inquiry to the two aspects of the question which, as we have seen, have been made the object of particular attention by international lawyers emphasizing the fundamental differences between the Anglo-Saxon and Continental conceptions of international law. They are, firstly, the differences in the conception of law; secondly, the differences in the function of judicial precedent.

Recht, droit, diritto versus *Law.*—It would be interesting to inquire who first propounded the view, which has now become an axiom with English lawyers, that the terms *Recht, droit, diritto*—in so far as they correspond to the English term "law"—are on the Continent confused with and frequently indistinguishable from the conceptions of right and justice. While the elucidation of the origin of this belief may be left to the student of the history of legal thought, the fact remains that leading English authorities, like Salmond and Holland, have held it, and that it is at present widely accepted and frequently repeated. But, it may be asked, from what representative Continental writings have English lawyers gained this notion, unless indeed they have relied on Ulpian's definition of jurisprudence as *rerum divinarum atque humanarum notitia, justi atque injusti scientia,* or on Celsius' definition of law as *ars boni et aequi*? In the conception and definitions of law in modern Continental jurisprudence, the distinction between law and morals and between the existing and postulated law is consistent and clear beyond doubt. Definitions of law—on the Continent and elsewhere—do, of course, vary. They may lay emphasis on the source of the legal obligation, for

and which in certain respects are so well suited to fill the gaps and make good the imperfections that exist in international law."

(The first public sitting of the XVI (extraordinary) Session on May 15, 1929, *P.C.I.J.*, Series E, No. 5, pp. 22, 23.) It is interesting to note how, alongside the view prevalent in this country that Continental jurisprudence is on the whole an idealistic and philosophical disquisition as to what law ought to be, there is among Continental writers a tendency to look to English equity as containing that element of justice, generosity, and adaptation which the Continental lawyer misses in the rigid application of the existing law under his own system of law. The pronouncement, quoted above, of Professor Anzilotti, is a good illustration of this view. The Continental jurist who sees in the English equity jurisdiction the embodiment of the equitable treatment and application of the law, will be somewhat surprised to find English writers urging the abandonment of the dualism of Common Law and equity in favour of the Continental system in which *aequitas* forms part of the positive law without there being assigned a special jurisdiction for its application.

instance, on the fact that it is a rule emanating from the state; they may have regard to one or more functions of the law, for instance, the securing of freedom, or of social needs or of the socially enforceable maximum of ethics or of the development of human personality; or they may be based on the coercive and heteronomous nature of legal norms. But in the flux of definitions there is, among jurists, the constant phenomenon of the realization of the difference between law and morals[1] and between what the law is and what it ought to be. The only substantial difference between the Continental and English-American terminology is that whereas in English usage the term law signifies either the legal order as a whole or a specific manifestation of it, on the Continent it connotes both the sum total of existing law and the subjective legal right of the individual derived from the positive law. Thus we find in Planiol's treatise a clear distinction between the two meanings of the term *droit*:

"Les emplois très variés qu'a reçus le mot *droit* se ramènent à deux sens principaux. Dans son sens fondamental, le mot *droit* désigne *une faculté, reconnue à une personne par la loi, et qui lui permet d'accomplir des actes déterminés.* Tels sont: le *droit de propriété*. . . . Dans un autre sens, le mot droit désigne *l'ensemble des lois*, c'est-à-dire les règles juridiques applicables aux actes des hommes. Ainsi on peut dire que les *droits* des individus sont déterminés par le *droit*. Dans cette phrase le mot droit est pris successivement dans les deux sens qui viennent d'être indiqués."[2]

The same distinction is even more current in Germany, whence it has indeed been taken by French writers.

There is nothing to warrant the view that "in Continental languages law and justice are called by the same name",[3] just as nothing would justify the Continental lawyer in assuming that there is in Anglo-American law a confusion between the two provinces because the term "right" serves the purpose of describing both a legally protected interest and a moral judgment, or because of the current usage referring to courts of justice when courts of law are meant,[4] or because the term "wrong" has a double connotation inasmuch as it may refer to a legal or to a moral wrong. In some way or other there have survived in different languages traces of the original identification of law, custom, and justice.[5]

[1] See an interesting paragraph on *Le Droit et la Morale* in the Introduction to the treatise of Colin and Capitant referred to below.

[2] *Traité élémentaire de droit civil*, 1st ed., 1899, § 2.

[3] See Salmond, § 4.

[4] See, for instance, Ross, *Theorie der Rechtsquellen* (1929), p. 80.

[5] In Ihering's *Der Zweck in Recht*, the reader will find an interesting exposition of the historical identity of these terms in the various derivations of the Greek δίκη and the Latin *mos*. See on this point Somlo, *Juristische Grundlehre* (2nd ed., 1927), § 41.

There is no reason to deplore this linguistic phenomenon. It is as a rule clear from the context in which sense a term is used. There is no confusion when we say "it is not right that X should have a right against Y", as there is no confusion when the German "*Recht*" is used with the same double meaning. In fact the question hardly arises for the lawyer at all. For, as a rule, lawyers use these terms in their legal sense only. The English reader will in general be on safe ground if, having regard to the context, he translates as a matter of course the terms *Recht*, *droit*, *diritto* as connoting either law pure and simple, or a legal right. In so far, therefore, as the supposed confusion in Continental jurisprudence between existing law and postulated law rests on the belief that the Continental term for law has a double meaning, it proves to be non-existent.

Apart from questions of terminology, the view that the science of jurisprudence and of legal philosophy on the Continent is distinguished by its confusion of what law is with what it ought to be, shows merely an imperfect acquaintance with Continental legal thinking. Has not the powerful "free law" movement in Germany been primarily directed against the predominance of positivist tendencies throughout the nineteenth century? Has not Ihering, even long before the "free school" movement, poured his scorn upon the positivist "jurisprudence of concepts" (*Begriffsjurisprudenz*)? Has not the French *école de l'exégèse*, which was predominant in the epoch following upon the adoption of the Code Civil and which reduced the judicial function to one of formal logical deduction, been successfully challenged by writers like Geny,[1] Lambert, and Saleilles? It is difficult not to gain the impression that English jurists have raised certain transient and historically conditioned characteristics of Continental legal method in the first three-quarters of the nineteenth century to the authority of a permanent quality of Continental legal thought. The international lawyer who is acquainted with the fact that it is from the Continent—in particular from Germany and Italy—that has come the rigid and frequently uncompromising positivist school in international law, will be specially inclined to treat with appropriate caution the accepted view of the nature of Continental jurisprudence. Probably the main reason which led writers like Salmond and Holland to speak of "strange lands" and "law in

[1] See in particular the chapter entitled "Exposé analytique de la méthode traditionnelle" in his *Méthode d'interprétation et sources en droit privé positif* (2nd ed., 1919), Vol. I, pp. 17–60.

the air" in the field of continental legal science is—apart from misconceptions due to the barrier of language—the fact that, for historical reasons, the preoccupation on the Continent with the problems of legal philosophy, especially in regard to the purpose of the law and the nature of judicial function, has been more intensive than in this country and, until recently, in the United States. The output of this aspect of legal thinking has been so large as to give to the casual observer the misleading impression that that is the whole of Continental legal thinking, and to cause him to attribute to the latter a confusion into which the observer alone has fallen.

The Authority of Judicial Precedent.—The second argument most frequently adduced in connexion with the supposed fundamental difference between Anglo-American and Continental legal thought is the one bearing upon the relative authority of judicial precedent and the resulting differences in the process of making and applying the law. The fact that in one group of countries judicial precedent constitutes a source of law whereas in others its formal authority as a source of decision in future cases is excluded either expressly or impliedly, is regarded by some as pointing not only to a mere difference in legal tradition and in judicial *technique* but also as showing a fundamental difference of legal approach, a difference between a pragmatic and practical approach based on former judicial experience and one relying on abstract reasoning from general principles. To some writers the whole question of the difference between the two systems of law reduces itself in fact to the difference in the function of judicial precedent.[1]

It is submitted that this view as to the fundamentally different function of judicial precedent under the two systems of law is based more on a consideration of appearances and of legal formulae than of the substance of legal life. It disregards the fact that, on the one hand, no formal provision of the law and no form of judicial organization can prevent judicial precedent from constituting a powerful factor of positive law, and that, on the other hand, the power of judicial precedent is in the long run not greater than the inherent value of the legal substance embodied in it. No legal doctrine and no express legal provision can do away with the fact that judges actually do, within their sphere, make law; that the legal principles or views enunciated in and underlying judicial decisions do inevitably influence judges in future cases *in pari*

[1] See, for instance, Lévy-Ullmann, *Eléments d'introduction générale à l'étude des sciences juridiques*, Vol. II, *Le système juridique de l'Angleterre* (1928), pp. 33–44.

materia; that such influence is due not only to the natural reluctance of courts to admit they were wrong in the past, but more particularly to the fact that these former decisions embody a volume of legal experience which is persuasive in itself; that judicial decisions, particularly when published, become part and parcel of the legal sense of the community; and that adherence to them, within the limits of justice, is imperative if the law is to fulfil one of its primary functions, i.e. the maintenance of security and stability as expressed in the ensuring of the fulfilment of legitimate expectations prompted by judicial decisions once given.

As mentioned, no express legal provision can prevent judicial precedent from exercising this function. In France, judges are forbidden, by virtue of Article 5 of the Civil Code, to lay down principles "par voie de disposition générale et réglementaire sur les causes qui leur sont soumises". This is perhaps the reason for the laconic precision of the great majority of the decisions of French courts, for the corresponding exuberance of the commentators, and for elaborate provisions calculated to secure some unity in the administration of justice by ensuring the binding effect upon inferior courts of the decisions of the Court of Cassation after the same case has come before it for the second time. But all this notwithstanding, and in spite of the fact that French courts are not bound either by their own decisions or by decisions of superior courts, it is hardly possible to doubt the actual authority and influence of judicial precedent in France. The volume of law reporting in France, the scope of annotations and comment upon them, and the weight attached to *jurisprudence* in daily practice, make it impossible to eliminate judicial precedent from any accurate account of the forces actually operating in the shaping of French law.[1]

The same applies to Germany, where a whole series of the provisions of the Civil Code has been interpreted out of existence in

[1] See on this subject Colin and Capitant, *Cours élémentaire de droit civil français*, 4th ed. (1923), Vol. I, pp. 35, 36. In the domain of administrative law the activity of French courts, in particular of the *Conseil d'Etat*, in regard to the existing law, is to a large extent built upon *jurisprudence*. See Hauriou, *La jurisprudence administrative de 1882 à 1929* (nouveau tirage, 1930), 3 vols. The following observations of an English lawyer speaking from practical experience are of interest: . . . "The impression which prevails in England to the effect that in interpreting the Code the French Courts do not recognize the doctrine of *stare decisis*, and are not influenced by the authority of precedent, is greatly exaggerated, if indeed it is not truer to say that it is simply mistaken. In point of fact great respect is paid in France to the authority of decided cases; indeed it is sometimes said that things have come to such a pass nowadays, that counsel no longer need display any knowledge of legal principle, since all that judges will listen to

consequence of the activity of courts.[1] In the decisions of the Reichsgericht, in particular in recent years, one finds elaborate references to previous judgments of that Court; not infrequently this enumeration concludes with the word "*daran ist festzuhalten*" (this must be adhered to). The way in which German courts have in the post-war period "adapted" the civil code law of mortgages to the extraordinary requirements of the inflation time offers a good illustration of the place of judicial decisions in the actual working of the law. There exists in France and in Germany a judge-made case law, and the authority of judicial precedent is not alien to those countries. It is not, however, the authority of single cases and precedents which is decisive, but their cumulative and growing weight. It is customary in this country to contrast the pragmatic method of English case law with the deductive and theoretical nature of the Continental approach. It would not be surprising to find Continental lawyers insisting on the pragmatic character of their own case law as contrasted with that obtaining in England.

While a study of the actual working of the administration of justice on the Continent must necessarily lead the English lawyer to revise his view as to the insignificance of the part played by courts and judicial precedent in the development of the law, the Continental lawyer, beginning the investigation from the other end of the road, must soon learn that the binding force of precedent in the Common Law countries is, to say the least, not higher than that of the written law in his own country. It is the inherent value of the law contained in a given precedent and the considerations of stability of legal relations embodied in the institution of precedent as a whole which are the soul of its vitality. Once these powerful factors supporting its formal authority have departed, the days of its operation are numbered.[2] There is in this respect a

is an exposition of the *jurisprudence*, as it is called." Sir Maurice Amos, *The Code Napoléon and the Modern World*, *Journal of Comparative Legislation*, 3rd ser. X (1928), p. 225. And see, to the same effect, Pound in *Harvard Law Review*, XXXVI (1922–3), pp. 646, 647.

[1] See the illuminating article of Professor Jung entitled "Das sogenannte Gewohnheitsrecht als Grundfrage der Rechtsquellenlehre" in *Archiv für Rechts- und Wirtschaftsphilosophie*, XXII (1928–9), pp. 227–59.

[2] This is not always realized by the Continental student of English law. As in other matters, there is here a tendency to attach exaggerated importance to formal legal doctrines without taking into account the actual operation of law. See, for instance, Lambert, *La fonction du droit civil comparé* (1903), as translated in *The Science of Legal Method* in *Modern Legal Philosophy Series* (1921), pp. 265–70, and, to the same effect, Gerland, *The Operation of the Judicial Function in English Law*, *ibid.*, pp. 229–50, who

difference of degree only between, on the one hand, so-called precedents of absolute authority, i.e. decisions of superior courts which are absolutely binding upon inferior courts, and of the House of Lords and of the Court of Appeal, each of which is absolutely bound by its own decisions, and, on the other hand, precedents of "conditional authority", which, as Sir John Salmond puts it, may be disregarded if they are wrong decisions, i.e. if they are contrary to law or contrary to reason.[1] Any disposition to disregard a precedent must necessarily be tempered by the consideration that the disturbance of certainty and stability resulting from such disregard may be more disadvantageous to the social purpose of the law than the apparent improvement in the soundness and justice of the rule achieved thereby. But no legal doctrine can save a precedent based on bad or obsolete law from being disregarded directly or by the less conspicuous but equally effective process of distinguishing. And, as Professor Allen has convincingly shown,[2] even the absolutely authoritative precedent is not immune from this process of distinguishing, in which free judicial activity necessarily asserts itself as it does on the Continent in respect of the written law.

Thus while under one legal system artificial limitations of the function of judicial precedent have necessarily given way to the requirements of legal stability and consistency in the administration of justice, under the other the authority of precedent as a formal source of law is and has always been limited by the requirements of justice, convenience, and reasonableness.[3] Undoubtedly there still remains the cleavage in legal theory consisting in the fact that under the Common Law a single judicial decision constitutes a binding precedent, whereas this is not its function under the Continental systems of law. This may be true, but it appears from

points to the "fundamental weakness of the English system" consisting in the fact that "every legal proposition, once authoritatively enumerated, becomes a legal rule" which "is no longer capable of further transformation, of further elaboration" (p. 249).

[1] *Jurisprudence*, §§ 57–9. [2] *Law in the Making* (1927), pp. 164, 165.

[3] When speaking of the wide differences obtaining between the two systems of law in the matter of the weight attached to the decisions of courts, Holland remarked that "there have been of late some symptoms of an approximation between the two theories" and that "while on the Continent judicial decisions are reported with more care, and cited with more effect, than formerly, indications are not wanting that in England and in the United States they are beginning to be somewhat more freely criticized than has hitherto been usual". (*Op. cit.*, p. 60.) Evidence of this approximation was not lacking throughout the nineteenth century. In any case his forecast has been substantiated in the last thirty years by a whittling down of the authority of judicial precedent in the United States (see on this subject Goodhart, "Case Law in England and America", *Essays in Jurisprudence and the Common Law*, pp. 50–74) and by an equally marked development in the opposite direction in the Continental countries.

what has been said above that the difference is one of legal theory only, and that in essence it is unable to affect either the latent possibilities of judicial precedent in one system of law or its necessary limitations in the other. An increased mutual understanding of the actual working of the administration of justice in the Anglo-American and Continental countries must, it is believed, show how inappropriate, particularly in the domain of judicial precedent, is the exaggeration of the idea of fundamental differences in the law in the two groups of countries. In this process of reducing the discrepancies to their proper proportions, international judicial settlement is destined to play a prominent part.

There are two principal reasons why the lesson which international judicial settlement affords on the question of the authority and function of precedent is specially instructive. The first is that the development of the law here takes place unhampered by artificial and traditional restrictions of any particular system of municipal law. The second is that in the field of international arbitration there have repeated themselves on a higher and different plane the causes which had a decisive effect in shaping the fate of judicial precedent within the state. Article 5 of the *Code Civil*, which forbids judges to lay down rules of general application to govern future cases, has its apparent counterpart in Article 59 of the Statute of the Permanent Court which lays down that "the decision of the Court has no binding force except between the parties and in respect of that particular case". The rule of the *Code Civil* was inspired by the doctrine of separation of powers and of the sovereignty of the people. The judge was expected to be merely "la bouche qui prononce les paroles de la loi".[1] It was regarded as derogatory to the sovereignty of the people to subject the citizen, not to the law of the state, but to the magistrate's personal judgment as to what was right. In the same way the positivist doctrine in international law has been insistent on interpreting Article 59 of the Statute as signifying a limitation of the power of judicial precedent in the international sphere, on the ground that international tribunals owe their very existence and such jurisdictional powers as they possess to the will of states whose sovereignty would be impaired by raising judicial decisions to the authority of a source of law.

This negative attitude was, however, bound to prove ineffective, not only for the reasons which caused judicial precedent to maintain itself in the sphere of municipal law even in the face of

[1] Montesquieu, *Esprit des Lois*, I, 6, Ch. 3.

express legal prohibitions, but also because in the international society judicial decisions constitute one of the not too numerous manifestations of the rule of law, as well as a powerful instrument for the crystallization of the abstract rules of international law. In the prevailing scarcity of agencies and opportunities for declaring and developing existing international law, no source is so poor that it can be ignored altogether; and the decisions of international tribunals are not the poorest of the sources. That is the reason why international tribunals are full of evidence of recourse to former decisions *in pari materia*, regardless of whether such tribunals are composed of Continental or Common Law judges. No student of international arbitration can fail to notice the eagerness of such recourse to previous arbitral decisions, an eagerness which is both conspicuous and, in view of the scarcity of the available material, almost pathetic. The Permanent Court of International Justice itself has referred to "principles recognized by the jurisprudence of international tribunals", in addition to the references to individual arbitral decisions, for the purpose of distinguishing or corroborating its own decisions.[1] This the Permanent Court is entitled to do by virtue of Article 38 of its Statute, which provides that the Court shall apply "subject to the provisions of Article 59, judicial decisions . . ." as a subsidiary means for the determination of rules of law. Thus it would appear that while the decisions of international tribunals in general may be relied upon as a subsidiary source without any limitations, the decisions of the Permanent Court may only be relied upon in future cases subject to Article 59. The result would be strange, if Article 59 were to be read literally and as referring deliberately to the doctrine of judicial precedent. It is submitted that it cannot be so read.

Does Article 59 of the Statute amount to an acceptance of the Continental doctrine?—The history of Article 59 shows that it was not originally intended to refer to the major aspects of the question of the authority of judicial precedent. In the draft of the Statute submitted by the Committee of Jurists of 1920, the present Article 59 did not appear at all. It was inserted by the Council of the League, acting on the strength of the so-called Brussels Report. This report leaves little doubt that the addition of the present

[1] See, for instance, Judgment No. 13 (Series A, No. 17, p. 57), in which the Court "in accordance with the jurisprudence of arbitral tribunals" refused to take into account possible but contingent and indeterminate damages. And see the discussion, in Advisory Opinion No. 11 (p. 30), of the problem of *res judicata* by reference to the award in 1902 of the Permanent Court of Arbitration in *Pious Funds of the Californias* case, or, in Judgment No. 9 (Series A, No. 10, p. 26), of the *Costa Rica Packet* case.

Article 59 had no reference to the question of the authority of precedent. It arose in connexion with the right of intervention as laid down in the present Article 63 of the Statute, which provides as follows:

"Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

Every state so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it."

In connexion with this article there must be read the provision of Article 62, which lays down that should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party, it being for the Court to decide upon this request. This was also the substance of Article 61 of the Draft. The reason for inserting the article as to intervention was, in the opinion of the Drafting Committee of 1920 and of the Brussels Report, to prevent situations from arising in which an apparently unimportant case between two states might, without other states having had an opportunity to put their view as to the legal position before the Court, result in a decision laying down certain principles of international law which might be inconsistent with the views held by other states. This, it was thought, applied in particular to the interpretation of multilateral conventions. It appears from the Brussels Report that the present Article 59 was inserted merely *ex abundanti cautela* in order to give a more explicit formulation to the provision that if a state uses its right of intervention, the construction given by the judgment shall be binding upon it in the same measure as it binds the original party to the dispute. "*This last stipulation*", the Report says, "*establishes, in the contrary case, that if a state has not intervened in the case the interpretation cannot be enforced against it. No possible disadvantage could ensue from stating directly what Article 61 indirectly admits. The addition of an Article drawn up as follows can thus be proposed to the Assembly: the decision of the Court has no binding force except between the parties and in respect of that particular case.*"[1]

The close connexion between Articles 59 and 63—indeed the fact that the former is supplementary to the latter—appears

[1] *Documents Concerning the Action taken by the Council under Article 14 of the Covenant*, p. 50. The italics are the writer's. See also *Procès-Verbaux* of the meetings of the Committee of Jurists of 1920, p. 776.

clearly from the fact that in Article 84 of Hague Convention I of 1907 for the Pacific Settlement of International Disputes (and in the corresponding Article 56 of the Convention of 1899) the two provisions were placed side by side. Article 84 was as follows:

"The award is binding only on the parties in dispute. When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them."

And a study of the proceedings of the Hague Conferences on this matter confirms the opinion that it was merely with this object in view that Articles 84 and 56 were inserted. In fact the very phrase now used in Article 59 of the Statute was proposed at one of the Committees of the Second Hague Conference in connexion with the question of interpretation of multilateral treaties.[1]

While an examination of the origin and the antecedents of Article 59 of the Statute shows that that provision has little to do with the adoption of the Continental, as distinguished from the Anglo-American, treatment of judicial precedent, a survey of the work of the Permanent Court in regard to the authority of its own decisions shows that the alleged clash between Continental and Anglo-American conceptions has been disregarded, and that the problem is being solved, not by reference to particular national decisions, but on the basis of the inherent value and of the inescapable influence of judicial precedent. Express reference to its previous pronouncements constitutes a constant feature of the activity of the Court. It is in this way that a considerable number of questions in the field of substantive international law and of arbitral procedure have now become crystallized as rules whose application by the Court in future similar cases may be safely assumed. This is shown by the way in which the Court has consistently discouraged the argument that treaty obligations

[1] See, for instance, the proposal of the so-called Fusinato Committee at the Second Hague Conference, *Actes et Documents*, II, p. 436, where the passage occurs: "Que la sentence arbitrale n'oblige que les parties en litige, et pour ce litige seulement". And see also on this point the deliberations of the Institute of International Law in *Annuaire*, XVI (1897), pp. 115 *et seq.*; XIX (1902), pp. 333 *et seq.*; and *Actes et Documents*, II, pp. 457 *et seq.*, 515 *et seq.*, 569; and on the whole question Lammasch, *Die Rechtskraft internationaler Schiedssprüche* (1913), pp. 97–124. Any other explanation of the present Article 59 would be utterly unintelligible seeing that the necessity of providing for a tribunal developing international law by its own decisions had been the starting-point for the attempts to establish a truly permanent international court as distinguished from the Permanent Court of Arbitration.

imposing limitations upon the sovereignty of states ought to be interpreted restrictively; in which it has followed an independent line of practice in considering preparatory work as an element of interpretation of treaties; in which it has asserted its right to give declaratory judgments; in which it has judged itself competent to assume jurisdiction by virtue of the implied consent of the parties and unhampered by defects of form in their submissions; in which it has asserted the international character of disputes in which a case has been taken up by a state on behalf of its nationals; and in numerous other questions.[1] To this constant and express reference to previous decisions there must be added the eagerness of the Court to explain any apparent inconsistencies between its various pronouncements.[2] The lack of hesitation in this reliance upon previous decisions is conspicuous, as may be seen from some of the typical forms of such reference: "As the Court has said in Judgment No. 12";[3] or "Nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion [as expressed in Advisory Opinion No. 6] on this point";[4] or, more generally, "As the Court has had occasion to state in its previous judgments and opinions";[5] or, simply, "Following the precedent afforded by its Advisory Opinion No. 3".[6]

Does the Court refer to its previous judgments merely by way of illustration? Or does the reference imply that it feels itself bound by its previous decisions? Or is it merely to emphasize the element of continuity in the work of the Court? These are idle questions. They tend to reduce the problem to the plane of national jurisprudential differences from which it has been lifted by the constant practice of the Court. This practice shows that if Article 59 was intended to stultify the task of the Court of developing international law by its own decisions and to prevent it from availing itself of the fruits of such development, then, with the concurrence of all the judges representing various systems of

[1] See, here, for a very useful synopsis of the relevant cases, *P.C.I.J.*, Series E, No. 3, pp. 217, 218; No. 4, pp. 292, 293, and No. 6, p. 300. See also *Annual Digest*, 1925–6, Case No. 329, and *ibid.*, 1927–8, Part X.B.

[2] See, e.g., Judgment No. 8, Series A, No. 9, p. 24; or, as to Advisory Opinion No. 12, Series E, No. 3, p. 226, where reference is made to a pronouncement made by the Court at the public sitting; or Judgment No. 2, Series A, No. 2, p. 16; or Judgment No. 12, Series A, No. 15, p. 24.

[3] Judgment No. 13, Series A, No, 17, p. 37; see also *ibid.*, p. 33; Judgment No. 7, Series A, No. 7, p. 19; Judgment No. 12, Series A, No. 15, p. 24; Advisory Opinion No. 9, Series B, p. 36.

[4] Judgment No. 7. Series A, No. 7. p. 31.

[5] Advisory Opinion No. 14, Series B, p. 36; *ibid.*, p. 28.

[6] Advisory Opinion No. 16, Series B, p. 15.

municipal jurisprudence, it has remained a dead letter. However, it has been submitted that it was not so intended. The practice of the Court amply corroborates this submission. Without adopting the Common Law doctrine as to the binding force of the single precedent, and while disregarding formal prohibitions reminiscent of legal provisions in individual Continental Codes, the practice of the Court has become an instructive manifestation of the intrinsic merits—inevitably revealing themselves under every system of law —of judicial precedent.

Conclusions.

It is submitted that the results of the investigation here undertaken justify the conclusion that there is no substance in the view that there exist two schools of international law—the Anglo-American and Continental—either in regard to specific questions of international law, or in respect of differences in those questions of municipal law which are of possible relevance in international law, or in the matter of general legal approach and method. The work of international tribunals shows that international judicial settlement, far from being impeded by the alleged existence of the "two schools of thought", is not actually confronted with the problem. An analysis, which reasons of space do not permit to be undertaken here, of the work of the Permanent Court in general and of the dissenting opinions and observations appended to its judgments and advisory opinions would show that the question has not arisen there at all.

There have been various causes which furthered both the wide acceptance and the continuation of the belief in the existence of an Anglo-American and a Continental conception of international law. For some it is the outcome of a generalization of divergent, although, as has been shown, transient interests of different groups of belligerents; for others, it has become one of the expressions of an attitude of caution in regard to obligatory arbitration; with others still it is largely the consequence of a vague feeling, born of the lack of acquaintance with foreign law and lying largely in the domain of sentiment, that there *is* a fundamental difference, whose consequences reveal themselves with fatal necessity in inter-state relations, in the various systems of law. It is submitted that an abandonment of this deeply-rooted belief is desirable. This is so not only on the ground that as a matter of legally relevant facts the two conceptions of international law do not exist and that it is therefore imperative to discard it on the ground of scientific

accuracy. There is an additional and not unimportant reason for doing away with what is essentially no more than a phrase.

The idea of the existence of two schools of thought in international law, in so far as it is based not on differences in respect of specific subjects of international law, but on a fundamental divergence of approach and outlook, is an undesirable idea from a more general and—if the term may be used here with due apology—humanitarian point of view. It suggests, as between the nations of to-day, differences in legal thinking of so fundamental a nature as to manifest themselves even in a field of relations distinct from those regulated by municipal law. Only a pedant would see any danger or undue inconvenience in the maintenance of traditional national differences in legal terminology, institutions, or regulation of specific aspects of conduct. But to elevate these divergences to the authority of fundamental differences in legal thinking likely to influence substantially judicial activity on matters of international law, i.e. on matters other than those directly affected by the differences of national jurisprudence, is to question that ultimate uniformity of the sense of right and justice which is the foundation of the legal ordering of the relations between states. In the future, when the exclusiveness of the conception of states as the sole subjects of the law of nations will have become a matter of the past, international law will coincide with *jus gentium* as originally conceived by Greek philosophers, by Roman jurists, by scholastic writers and by the father of international law, that is to say it will become again the common law of mankind—a conception which is probably much older than that of *jus naturæ*. That time is still far off. But present day international law at least constitutes a successful attempt at a common law of mankind, of relatively intensive and pervading universality and uniformity, in the limited field of relations between sovereign states. This is in itself no mean achievement. There is no good reason why it should be imperilled for the sake of traditional notions of doubtful legal value.

THE COURT OF CHANCERY AND RECOGNITION 1804–31

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I

In recent years municipal courts have been called upon to consider many difficult legal problems arising out of the existence of unrecognized states and governments. While, however, the law in this respect has grown much clearer, criticism of it has grown much louder. There is a feeling that the unrecognized state or government has been somewhat harshly treated, with the consequence, in many cases, that private individuals have unfairly suffered. The unsatisfactory results of certain cases have been pointed out, and practical amendments of the law urged, by various writers. If, however, this criticism is to be really damaging, it must go somewhat further. For the law as it stands to-day is largely the result of the application of principles contained in precedents, and it must be borne in mind that the application of principles, however sound, may on occasion work injustice. It is, in fact, necessary to show that the old precedents rest on no good foundation.

Such a task would be outside the scope of an article. No more is proposed here than to examine, with the above considerations in mind, the first cases in the English courts in which the question of recognition directly or indirectly affected the issue. These cases form a well-defined period, in which the Court of Chancery under Lord Eldon and others acting in avowed accordance with his views laid much of the foundations of the law as it stands to-day.[1] The period closes in 1831, with the case of *Thompson* v. *Barclay*;[2] for many years after, recognition problems were not to trouble the English courts. That case is, however, more than a chronological landmark. It is interesting in that Lord Brougham in his judgment strongly criticized Lord Eldon's attitude in recognition cases, and incidentally furnished a valuable clue to it, in suggesting that Lord Eldon believed that if he allowed anything to be said in his court of an unrecognized state, he would be "recognizing" it.

[1] There were few cases in the Common Law Courts, and their influence on the development of the law was not great. They have, however, certain features of interest which it is hoped to discuss on another occasion.

[2] 9 L.J. (O.S.) Ch. 215.

However, Lord Brougham had to give judgment in accordance with Lord Eldon's decisions. One of them, which Brougham regarded as decisive, is unreported. It was in an attempt to trace it in contemporary newspapers that some of the cases to be mentioned later came to light. Though they do not possess the authority of cases officially reported, they are, at least, of interest in tracing the early development of the law.

II

As a result of the French Revolution and the successful struggle of Spanish America for independence, new states arose, many of which the British Government hesitated to recognize. These states were, however, in existence, and British subjects could not be prevented from having dealings with them or concerning them. Consequently, the courts found themselves confronted with some embarrassing questions; the status of these new states had to be ascertained, and, where recognition had been withheld, the consequent legal effects determined. In this task, precedent afforded little assistance. There had been, indeed, some cases arising out of the American War of Independence in which inquiry had been made into the legal status of the colonies before the Treaty of Versailles; but the conclusions reached were vague and even conflicting.[1] It was not, however, only with regard to the position of revolutionaries that the law was uncertain; the courts were not accustomed to considering dealings even with recognized foreign states, nor to their appearance before them as plaintiffs. As late as 1797, Lord Loughborough could say, "I wish it to be considered, whether any foreign sovereign under any denomination can sue in a municipal court of this country; whether it is not matter for application from state to state. I do not think it easy to find in the old cases any direct and plain authority."[2] He concluded that, at best, such a proceeding was very unusual, and rather irregular. This is a significant statement. From a general point of view, in the difference between the law as it stood then and as it stands now can be seen an interesting feature of modern times—the greater readiness of states to seek redress in suitable cases in the courts of other countries. In the second place, and more important for our present purpose, it affords an explanation of the hesitancy with which the English courts at first proceeded in deciding cases in which foreign states were involved.

[1] See e.g., *Wright* v. *Nutt*, 1 H. Bl. 137; *Folliott* v. *Ogden*, 1 H. Bl. 124; and 3 T.R. 736.
[2] *Barclay* v. *Russell*, 3 Ves. Jun. 423.

III

It was mainly to Lord Eldon that the task fell of dealing with these cases. The first came before him in 1804. The City of Berne moved for an injunction to restrain the Bank of England and the trustees from dealing with certain stock, standing in the name of "the old Government of Berne before the Revolution".[1] The defendants opposed the motion, on the ground that "the existing Government of Switzerland, not being acknowledged by the Government of this country, could not be noticed by the Court". Lord Eldon refused to make the order asked, observing that it was "extremely difficult to say, that a judicial court can take notice of a Government never authorized by the country in which that Court sits; and whether the foreign Government is recognized or not, is a matter of public notoriety". Thus two important questions had been answered. The right of an unrecognized state to sue in the courts of a state that does not recognize it had been denied. Secondly, it was laid down that the status of such a state could be ascertained from "public notoriety"; in other words, the courts would take judicial notice of the granting or withholding of recognition by the British Government. If a given state was unrecognized, the courts would not "take notice" of it. In this latter expression lurks an ambiguity. Here it would appear to be merely equivalent to "give a *locus standi in judicio*"; later, however, this term was used as including almost any mention of a state in judicial proceedings. When it is remembered that at that time more than one word[2] was used for "recognize" in its legal sense; and since "recognize" and "take notice" bear somewhat similar meanings in ordinary parlance, it is not surprising that some confusion should arise as to their legal significance. This was to be of importance later.

So far, we are on clear ground. Unfortunately, however, this case did not end the efforts of the Government of Berne in claiming the stock, for two further cases occurred on the same subject, in which Lord Eldon expressed himself with considerable ambiguity. In *Dolder* v. *Bank of England*[3] the immediate question for decision was merely one of paying money into court, but the Lord Chancellor made certain observations which are of interest. "A very considerable question is whether, if that subsequent government was never acknowledged by the Government of this country, the

[1] *City of Berne* v. *Bank of England*, 9 Ves. Jun. 347.

[2] e.g. "authorize", "acknowledge".

[3] 10 Ves. Jun. 352 (1805). Dolder was an official of the Government of Berne.

municipal courts, merely administering the law of this country, can act upon it. Some perplexity arises from what we know, and what we can only know judicially. I cannot affect to be ignorant of the fact that the Revolutions in Switzerland have not been recognized by the Government of this country: but as a Judge, I cannot take notice of that. While that fact is in doubt, which will make a vast difference to the decision," at the moment it was only necessary to settle the payment of money into court.[1] Similarly in *Dolder* v. *Lord Huntingfield*,[2] where the decision was only on a matter of pleading, Lord Eldon remarked: "As to the question, Whether, if a new state was to arise in Europe, a Court of Justice is to take notice of it; if it does not appear by averment on the record; or upon an allegation, according to information and belief, that a Revolution has taken place; first, these last words are too loose; secondly, it is not easy to decide what a Revolution means in a Court of Justice."

In reading these two cases, it is somewhat difficult to realize that *City of Berne* v. *Bank of England* had ever been decided.[3] When a suit by an unrecognized government had been immediately dismissed, we should expect to find similar treatment accorded to a suit in the name of its agents. Again, from the passages above quoted, it seems that Lord Eldon no longer held "public notoriety" to involve judicial notice of recognition or non-recognition. Nevertheless, it cannot be said that these two cases go so far as to overrule *City of Berne* v. *Bank of England*;[4] on the other hand, to follow the practice of some writers who cite them as supporting the authority of that case, is scarcely justifiable. They are best regarded as a period of doubt on the part of the Lord Chancellor, which, if it had no practical effect on the law, is of significance as showing that on this subject a great judge was not free from confusion.

[1] It was ordered that the motion be made again, with the Attorney-General a party. The latter order seems to have been due to a possibility that the stock claimed might go to the Crown as *bona vacantia*; not, as one might be tempted to think, to a desire that the Law Officers of the Crown should appear and give information as to the status of the Government of Berne.

[2] 11 Ves. Jun. 283. Lord Huntingfield was a trustee of the stock.

[3] The only mention of the City of Berne case in *Dolder* v. *Bank of England* and *Dolder* v. *Lord Huntingfield* is on the part of the reporter, who notes that "the fund was the subject of a former application". It may also be mentioned that the head note to *City of Berne* v. *Bank of England* states that a foreign government which is not recognized cannot sue here; but in the notes to the two later cases this proposition is qualified with a *Quaere*.

[4] See the observations of Roche J. on this subject, in *Luther* v. *Sagor*, [1921] 1 K.B., at p. 475.

IV

Lord Eldon was not to be troubled by the unrecognized state again until 1823.[1] By that time the revolt of Spanish America had been largely successful, but the British Government had not yet decided to recognize the new states thus set up. But it was to England that these states turned to raise the money necessary for the purposes of government; disputes arose in connexion with these loans, which came before the courts. Various embarrassing questions were thus raised with regard to the legal results of the non-recognition. Lord Eldon, showing himself free from the confusing ambiguities of *Dolder* v. *Bank of England* and *Dolder* v. *Lord Huntingfield*, took up an attitude which, if hesitating, was always consistent. Its nature will appear from the illustrations given below.

At the beginning of 1823 a motion was made for an injunction to restrain the contractors of a loan for the Colombian Government from sending out the money held by them.[2] The Lord Chancellor observed: "The Government of Colombia, so called, was not yet recognized by the King in Council, and it was not for him to do anything in that Court which would imply that it was there recognized as an Imperial Government . . . he could not undertake, in the proceedings of the Court, to assume a character for that government which had not been allowed to it by an authority much higher than his own."[3] The injunction was granted; but the Colombian Government was mentioned in it merely as the "alleged Colombian Government".

Here there is a clear enunciation of Lord Eldon's policy. The

[1] The interval had not been entirely devoid of recognition cases. The most important of these were in the Admiralty Court, in 1805–8, where the status of St. Domingo, a French colony in rebellion whose independence had not been recognized by Great Britain, was considered. As these cases had no influence upon the Court of Chancery, they are not mentioned here. There is an admirable discussion of them in an article by Professor E. D. Dickinson, "Les Gouvernements ou Etats non reconnus en Droit Anglais et Américain", *Rev. de Dr. Int.*, 1923.

[2] Shortly before this case, the defendants (Herring & Co.) made an application to the British Government concerning the loan. The matter was referred to the King's Advocate, Sir Christopher Robinson, whose opinion, dated January 15, 1823, is in the Public Record Office (Law Officers' Reports, Colombia; F.O. 83, 2254). His conclusion was that "H.M.'s Government cannot safely interfere in this transaction in any public manner, at least, which I can suggest, without raising questions which must involve the public Character and Responsibility of the persons exercising the authorities of Government in the Republic".

[3] *The Times*, January 21, 1823. I can find no further mention of proceedings in this connexion, save that the Vice-Chancellor gave permission to the defendants to pay the dividends on the loan—*The Times*, March 26, 1823.

courts must take their cue from the Executive in matters of recognition. He hesitated to do anything that should make it appear otherwise. Shortly after the case just mentioned, he again had occasion to apply this principle. A motion was made to set aside an appearance that had been entered without authority on behalf of certain persons, who, in the affidavit supporting the motion, were described as "Ministers Plenipotentiary of the Government of Peru". The Lord Chancellor at once said, "I cannot sit to hear it stated that an application is made on behalf of the Government of Peru. I know of no Government, until the Government of this country acknowledges it as such." On the matter being pressed, Lord Eldon continued:

"See what a difficulty you put me under by this course; for by this it would appear that I am taking notice of a government that I know nothing of, and can know nothing of, sitting here in the King's Court. If I were to admit this description [of the persons as 'Ministers'] to be upon the file of this court, I do not know whether you might not come here by and by claiming privileges of any kind, I cannot tell what, on behalf of persons, I cannot tell whom. . . . I cannot give to these persons a character which I have no authority to recognize."[1]

The affidavit was ordered to be amended; and the appearance was subsequently withdrawn on an affidavit in which all reference to the official position of the gentlemen was omitted.[2] These "Ministers Plenipotentiary" were a Mr. Garcia del Rio and a Mr. Paroissien; it is probable, therefore, that this incident occurred in the preliminary stages of the next case.

Jones v. *Garcia del Rio*[3] is the first case in the official Chancery reports in which Spanish America was considered. It was a suit by certain holders of stock in a Peruvian Loan against Garcia del Rio and Paroissien, "who had styled themselves Envoys of the Peruvian Government, and entitled to raise a loan for it", and against the contractor, Kinder, and the bankers, Messrs. Everett, to whom subscriptions had been paid, praying for an account of the money. The plaintiffs alleged that the defendants had misrepresented the security of the loan, because there was no Peruvian Government, Peru being still a part of Spain. The defendants admitted that Great Britain had not recognized the Peruvian Government, but maintained that there was such a government, and that Peru was in fact independent of Spain. In his judgment Lord Eldon intimated strong doubts as to the propriety of his deciding such a matter:

[1] *The Times*, February 13, 1823.
[2] *The Times*, February 19, 1823.
[3] 1 Turn. and Russ., 297 (1823).

"I want to know, whether, supposing Peru to be so far absolved from the government of Spain that it can never be attached to it again, the King's Courts will interfere at all while the Peruvian government is not acknowledged by the government of this country. What right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognize? Another question is, whether, if individuals in this country choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, the Courts of Justice here will assist them to recover their money, and will not leave them to get it as they can."[1]

It was not, however, necessary to decide the case on these grounds; the bill filed by the plaintiffs was held to be improper, as it purported to be on behalf, not only of themselves, but of other shareholders, who had apparently not been consulted in the matter at all.

The points that had arisen concerning Spanish America before this case had been merely matters of form and description. Here, a more important subject was touched on—the attitude of the courts to the dealings of British subjects with unrecognized states. In the passage quoted above Lord Eldon showed that he was very doubtful, first, whether the courts could have anything to do with contracts with such states; secondly, whether loans to them were not outside the protection of the courts on the additional ground that they went to support rebellion against a friendly Power.

The case of *Thomson* v. *Byree*[2] in the next year affords another instance of the Lord Chancellor's determination to allow no formal mention of an unrecognized state in the proceedings of his court. The plaintiff had borrowed money from the defendant, for which he had given the defendant some Colombian debentures as security. Being now ready to repay the loan, he asked for an injunction to restrain the defendant from parting with the security. Lord Eldon said he could take his injunction, but he could not allow the debentures to be called debentures of the Republic of Colombia. It was then suggested that they could be "described in the order as debentures signed by a person named José Maria Caballo". To which the Lord Chancellor replied: "I do not see any objection to that; but sitting as a Judge in one of His Majesty's Courts, I am not to know there is a government in the world which he has not recognized. I know that it is acknowledged elsewhere, but I have nothing to do with that."

Here, the fact that Colombia was not recognized was not

[1] At p. 299.

[2] *The Times*, May 31, 1824.

essential to the issue, and a verbal alteration sufficed to obviate difficulties. In *Kinder* v. *Taylor*,[1] however, it was strongly hinted that a party whose case was fundamentally based upon the existence of an unrecognized state could not hope to succeed. This case arose out of a dispute over the affairs of a company working silver mines in Mexico. Garcia del Rio and Paroissien had been connected with the formation of this company in 1823, and they were described in the bill as having come over to this country "in the capacity of envoys and ministers plenipotentiary of the government of Peru". Lord Eldon observed:

"If the plaintiff's case were to depend upon the truth of those facts [the status of these persons] I should dismiss the bill directly; because His Majesty's Courts of Justice cannot recognize the fact, that there was any such thing as a government of Peru in the year 1823. Nor am I aware at present, whatever matters may be in progress, that any of the King's Courts can acknowledge or admit that there is such a government at this moment."

This was the last case in which Lord Eldon referred to unrecognized states. It was not, however, the last case in the Court of Chancery concerning the revolt of Spanish America. Later in 1825, *MacNamara* v. *Devereux*[2] came before Leach, V.-C. The plaintiff, "Commissary-General of an Irish Legion in the Colombian service", sought to make its Commander come to an account with him in respect of arms and equipment supplied. The defence demurred on the ground that the claim arose out of transactions contrary both to public policy and to the Foreign Enlistment Act, 1819. The Vice-Chancellor allowed the demurrer, "as the transactions stated in the bill were clearly illegal"; though whether for both of the reasons put forward by the defence does not appear.

In 1828, there were two cases and, in deciding both, Shadwell, V.-C., expressly stated that he was applying Lord Eldon's principles. The facts in *Thompson* v. *Powles*[3] were, briefly, as follows. The defendants were two firms of merchants, Powles and Co. and Barclay and Co. The latter had advertised for tenders for the purchase of a loan to Guatemala, and the offer of the former was accepted. Powles induced the plaintiff to take up some of the loan; he was to pay for it, by instalments, to Barclay, and, if any instalment was not paid, all those previously paid were to be forfeited. The plaintiff was about to pay the sixth instalment, when Powles dissuaded him, alleging some disagreement between

[1] 3 L.J. (O.S.) Ch. 68 (1825).

[2] 3 L.J. (O.S.) Ch. 156. The date there given is May 4, 1824; this must be a misprint for 1825, as the case is reported in *The Times* of May 5 of the latter year.

[3] 2 Sim., 194.

Barclay and the Guatemalan Government. The plaintiff now sought to recover his money. He alleged that Barclay and Co. were not in fact authorized to raise the loan; that the tender for it by Powles was part of an arrangement with Barclay, with the object of enhancing the apparent value of the loan; and that he had been prevented from paying an instalment, in order that those previously paid might be forfeited. The defendants did not attempt to deny these allegations; but demurred on the ground that, Guatemala not being recognized, the whole transaction was illegal, and therefore the Court could not assist the plaintiff to recover.

The Vice-Chancellor allowed the demurrer, and said:

"I confess that, after all I have heard fall from the mouth of Lord Eldon, on the subject of persons representing themselves to be governments of foreign countries, which this country had not acknowledged to be governments . . . it does appear to me that this is a contract entered into by the plaintiff for the purpose of purchasing that which, by the law of the land, he could not purchase. I think that the contract, being to purchase securities from . . . the Government of Guatemala, cannot be considered as a contract which this Court ought to sanction."

From this decision the plaintiff appealed; but before the appeal was heard—three years later—another case, with almost identical facts, occurred, which it will be more convenient to consider first.

Taylor v. *Barclay*[1] was an action against the same defendants as in *Thompson* v. *Powles*. In the bill, Guatemala was falsely alleged to have been recognized by Great Britain, in order to prevent a demurrer such as had been fatal to the plaintiff in *Thompson* v. *Powles*. The defendants, however, did demur; Guatemala had not been recognized, and the Judge was bound to know that the statement to the contrary was false. The plaintiff then contended that the appointment of consuls to Spanish America, and a meeting between officers of the King and Guatemalan functionaries at a congress at Panama might be a recognition of which a Judge would not be held to have judicial knowledge. The answer of the defence was that the Foreign Office stated that Guatemala had not been recognized.[2] In his judgment, the Vice-Chancellor said that he had had communication with the Foreign Office, and that recognition had not been accorded. He could not give effect to the averment to the contrary, for "sound policy requires that the Courts of the King should act in unison with

[1] 2 Sim., 214 (1828).

[2] In a contemporary newspaper report, counsel prefaces this statement by announcing that he had "discovered a fact worth a thousand arguments".

the Government of the King". He then stated that Lord Eldon would not allow a plaintiff to sue in the Court of Chancery, if he founded his case upon the existence of a government which had not been recognized. In this connexion, he mentioned the case of *Biré* v. *Thompson*,[1] in which he had held a brief. In that case, the defendant had agreed to take a lease of certain salt mines from the Republic of Colombia. While he was in England raising the money necessary, an injunction was sought to restrain him from transferring part of the contract. In the opinion of the Vice-Chancellor, the injunction would have been granted, "unless there had been this objection, founded upon the representation that the original contract was made with the Government of the Republic of Colombia . . . and the note I have is, that the Lord Chancellor refused the application because he could not take notice of the Republic of Colombia". On the analogy of this case, and on the grounds mentioned above, the demurrer was allowed.[2]

The appeal in *Thompson* v. *Powles*[3] came before Lord Brougham in 1831. In his judgment, he pointed out that the result of that case was tantamount to saying that, because a person had committed the illegality of contracting a loan with an unrecognized

[1] Apparently unreported. In the report of *Taylor* v. *Barclay* in 7 L.J. (O.S.) Ch. 65, it is referred to as *Byerly* v. *Thompson*, and the date given as June 4, 1824. Though the immediate points at issue have no resemblance, the similarity of the names of the parties and the proximity of the dates suggest that the case of *Thomson* v. *Byree* mentioned above may have arisen out of the borrowing of money to work the salt mines.

It is, perhaps, *Biré* v. *Thompson* to which reference is made in a note to *City of Berne* v. *Bank of England* (*supra*): "So the Court refused to act in a suit instituted by persons representing themselves as the Colombian Government, which was not recognized by the Government of this Country: 1823, 4".

[2] Some light is thrown on this, the first occasion on which a Judge consulted the Foreign Office as to the status of a foreign state, by an opinion of the Law Officers, dated July 12, 1828 (Public Record Office; Law Officers' Reports, Central America: F.O. 83, 2242). Barclay & Co. had inquired of the Foreign Office whether Guatemala was recognized, and the matter was referred to the Law Officers. Taking into particular consideration the "guarded manner" in which the Commission of H.M. Consul-General in Guatemala was worded and the fact that a Guatemalan envoy who had come to England in 1826 had never been formally received as such, they came to the conclusion that the acts of His Majesty's Government did not amount to "a recognition of the State of Guatemala as an independent Government". As, however, it was "a matter of some delicacy", it was advised that Barclay & Co. should not be given the information they desired.

The opinion is signed by Sir Herbert Jenner, K.A., Sir Charles Wetherell, A.-G., and Sir Nicholas Tindal, S.-G. On the back, there is a note—"Copy to the V.-Chancellor Nov. 15/28". The hearing of *Taylor* v. *Barclay* was begun on November 12; on November 19, after further argument, judgment was given. It seems probable, therefore, that the opinion was sent to the Vice-Chancellor in response to his request for information.

[3] 9 L.J. (O.S.) Ch. 215; reported as *Thompson* v. *Barclay*.

state, he could with impunity defraud others in transactions arising out of it.[1] Upon this absurdity he enlarged at considerable length; but much of his criticism proceeded upon the view that the appellant, though a holder of scrip, was in no way a party to the loan. Lord Brougham was, however, on safer ground when he proceeded to attack Lord Eldon's attitude in matters of recognition. In his opinion Lord Eldon had been misled by "the words 'recognition' and 'acknowledgement', and the generalities of these expressions to a certain degree", into thinking that, if he gave relief at all where an unrecognized state was concerned, he would be recognizing that state. For his part, Lord Brougham could not see that saying that Thompson had a right to have his money back involved the recognition of Guatemala. Nevertheless, he was bound by Lord Eldon's decisions, and considered them to apply in the present case. The appeal was, accordingly, dismissed.[2]

V

The decisions of the Court of Chancery in this period form the basis of much of the law as it stands to-day—not only in England but elsewhere. It was in this period that the fundamental principle was laid down—that "the Courts of the King should act in unison with the Government of the King". Consequently, in cases wherein recognition was of importance, it was the first duty of the Court to ascertain the attitude of the Government. Where it was notorious, judicial notice was taken of it; in a doubtful case, direct inquiry was made of the Foreign Office, and the answer received was treated as conclusive. This is still the practice to-day.[3] When the attitude of the Government had been ascertained, the principle stated above came into play. Its application necessarily involved refusing to allow an unrecognized state to sue in our courts; for it would indeed be a singular contradiction if the courts were to listen to the complaints of a state with which the Government would have nothing to do.

So far, the Court of Chancery had acted wisely; but the manner in which the principle that the courts must follow the Government was applied to the determination of the effects of non-recognition

[1] Lord Brougham was, however, careful to say that he put this merely by way of argument, for, "although Messrs. Barclay & Co. have not denied, *non constat* they cannot disprove the fraud".

[2] But without costs.

[3] For the courts acting *mero motu* in notorious cases, see *Mighell* v. *Sultan of Johore*, 1894, 1 Q.B. 149. For a summary of other methods than direct inquiry of the Foreign Office by the Court, see McNair, "Judicial Recognition of States and Governments" in *B.Y.I.L.*, 1921–2.

on the rights of private persons led to less happy results. It can be seen from the cases considered above that the Court of Chancery would not assist a party whose case was founded upon dealings with an unrecognized state. From the influence of this view we have not yet escaped; but of recent years criticism of its wisdom has been growing. Its unsatisfactory results have been ably demonstrated elsewhere,[1] and need not be gone into here. Having examined the early cases at some length, we are, however, in a position to offer some suggestions as to its cause.

It is believed that the cases considered justify the following conclusions. The law as settled in this period was the work of Lord Eldon; for, at the beginning, he was unencumbered by precedents; at the end, the Vice-Chancellor explicitly followed his views. Now the attitude of Lord Eldon was largely influenced by the desire to do nothing in his court contradictory of the Government's policy in matters of recognition; for, it must be remembered, he was a member of the Government. The power of the court to embarrass the Government in this respect he rated curiously high. For this, a lack of terminological clarity was largely responsible. It will have been apparent to the reader that in the foregoing cases there was considerable confusion in the different senses of the words "recognize", "acknowledge", and "take notice". In consequence of this confusion, Lord Eldon came to fear that, if he allowed any formal mention of an unrecognized state in the proceedings of his court, he would be recognizing that state. So, when private individuals had causes of action connected with an unrecognized state, the court said, in effect, "we cannot help you; to do so, would be to recognize this state".

The writer considers that Lord Eldon's fears were groundless. For they rest upon the notion that, though recognition is a matter for the Government to decide, there is nevertheless in a court the power to grant it. This view is scarcely tenable now. Even if a court has such a power, it would surely need more to effect its exercise than the mere decision of a suit between private persons in which an unrecognized state is only indirectly involved. Such an act would have been no more than an admission on the part of the court that such a state existed.[2] If such an admission were held to be equivalent to recognition, then it might equally be said

[1] See, e.g., Dickinson, *op. cit.*; Fraenkel, "Juristic Status of Foreign States", *Columbia Law Review*, 1925; Hervey, *Legal Effects of Recognition in International Law*.

[2] The Common Law Courts in this period freely made such admissions, and even investigated the affairs of unrecognized states. But their views have not obtained the authority of those of the Court of Chancery.

that, when a member of the Government announces to parliament that a certain state has not been recognized, there is a recognition of that state. Thus, in an admission of the existence of a state, it does not appear that there would be any infraction of the principle that the courts must follow the Government. That principle could only be infringed by the courts allowing an unrecognized state to exercise such rights as can only be asserted after recognition;[1] not by a mere adjudication upon the rights of private persons. If, however, as it is believed, the courts have no power to grant recognition, then Lord Eldon acted mistakenly. Others have pointed out that his attitude has led to unfortunate results; it is here suggested that no valid reason existed for taking it; if these conclusions be admitted, there is little justification for the continuance of its influence.

[1] e.g., right to sue in courts of a foreign country, immunity of public ships, &c.

THE LEGAL NATURE OF THE MINORITIES PETITION

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THE stipulations upon which all procedure in minorities questions must be based are contained in Article 12 of the Polish Minorities Treaty and the corresponding articles of the other treaties. Most of the declarations relating to the protection of minorities also reproduce these stipulations.

The second paragraph of Article 12 provides that—

> "Poland agrees that any member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction or any danger of infraction of any of these obligations and that the Council may thereupon take such action or give such direction as it may deem proper and effective in the circumstances."

These words are the kernel of the article. Their effect is to vest in every member of the Council the right to bring alleged infractions to its notice, or, to use the terminology which has sprung into existence, to "seise" the Council of an alleged infraction.

The simplicity of this proposed mechanism is disconcerting to one who studies the rules of procedure at present in force in this branch of the activities of the Council of the League. For since 1920 there has been created a procedural code which is far from simple and which, moreover, operates long before the allegations concerned are formally brought to the Council's notice in accordance with Article 12, paragraph 2.

The most characteristic and the most vital institution in this preliminary procedure is the minorities petition. Any individual or body of individuals, any organization, national or international, any state, member of the League or not, may send a petition to the League alleging an infraction of a minorities treaty. That petition, if it satisfies certain tests (to be examined shortly), will be sent to the state whose action is complained of, for its comments. Then the petition and comments will be communicated to all the individual members of the Council for their information. At the same time a "Minorities Committee" consisting of three or five members of the Council will consider the documents with a view to deciding whether the matter should be brought before the Council under paragraph 2 of Article 12. Any individual

member, whether represented or not on the Minorities Committee, may bring about this result.

These facts are mentioned here in order that some impression may be gathered of the place of the petition in the preliminary procedure. They are useful also, because, even in this sketchy form, they indicate that the treaty provisions are only a part of a more considerable set of rules. They are to-day the final stage of a complicated process, empirically produced since the treaties came into force.

From a legal point of view these rules, which the Council itself has set up, are to be sharply distinguished from the treaty provisions themselves. It is not intended to enter here into a discussion of this wider distinction. Only a limited inquiry will be undertaken, namely—What is the legal nature of the minorities petition? Incidentally it will be seen how the act of submitting a petition to the League is to be distinguished from the act of a member of the Council exercising its rights under paragraph 2 of Article 12.

We will first examine the three outstanding features of the petition, and then give an account of the tests of receivability to which petitions are submitted.

A. The Petition is mere Information

It was the well-known Tittoni Report of October 22, 1920, which first "indicated to the minorities the method of petition as being an excellent means of rendering effective the protection accorded to them by the League".[1] Its general tenor may be stated shortly in the following extracts.

"The right of calling attention to any infraction or danger of infraction (of any of the obligations in respect of minorities) is reserved to members of the Council." This right is a right to set in motion the judicial machinery of the Council. It "does not in any way exclude the right of the minorities themselves or even of states not represented on the Council to call the attention of the League of Nations to any infraction or danger of infraction. But this act must retain the nature of a petition or a report pure and simple; it cannot have the legal effect of putting the matter before the Council and calling upon it to intervene."

A close examination of these sentences reveals that the word "right" is used by M. Tittoni with a different meaning in each. The "right" of members of the Council is a legal right conferred upon them by the treaties. The "right" to submit petitions has,

[1] Report of the Council to the Sixth Assembly (Para. V of Cap. 7 of the Supplementary Report).

however, no legal existence. To say that individuals have a right to petition is merely to state the fact that information may be submitted to the League concerning the operation of the treaties, and that, when so submitted, the League through its organs takes note of that information. The Council, in exercise of its functions as guarantor, has given facilities to persons belonging to the minorities (along with all other persons and states not members of the Council) to send information to the Secretariat.[1] That has not vested any legal right in those persons. It has merely produced a state of facts in which information in the form of petitions is received as a matter of course, and submitted to a certain procedure. The Adatci Report of 1929 gives the essence of the matter when it concludes that "it is difficult to lay down a precise line of demarcation between petitions of minorities in the strict sense of the term and communications of other kinds sent to the League on the subject of the protection of minorities".[2]

This difference between the legal act of seising the Council and the informative submission of a petition has important consequences which are not always clearly understood. The procedure to which information in the form of petitions is subjected is not judicial. It does not produce any new legal situation, and should not, therefore, be subject to the same restrictions as procedure which does produce such a situation.

There is a tendency to overlook this fact which has recently been well described by Mr. Dandurand, the Canadian representative on the Council in 1929. Speaking in the Council on June 13, 1929, he said: "Since the Council had, on several occasions, laid it down that minorities had no legal personality and were not parties to a suit but could only act as agents of information, the practice had become more and more frequent of eliminating them as sources of information during the examination of their petitions by the Committees of Three."[3]

Examples of the attitude complained of by Mr. Dandurand are not difficult to find. It is reflected in the former refusal of the Minorities Section of the Secretariat to communicate to petitioners

[1] Compare the statement of M. Scialoja (Italy) in the Council in September, 1925 (*Official Journal of the League*, October, 1925, p. 1400) during a discussion on the Memel Convention that "M. Galvanauskas thought that Lithuanian citizens had not the right of petition and M. Scialoja considered that M. Galvanauskas's view was correct. It was not therefore a question of claims but merely of information". See *ibid.*, pp. 1395–1401, for interesting, though often unsound, comments on the nature of the petition generally.

[2] See Supplement No. 73 to *O.J.*, p. 58.

[3] *Ibid.*, p. 36.

further news than a formal acknowledgement of receipt of petitions, or a formal statement that they are being submitted to the procedure in force. This refusal is perhaps justifiable from the point of view of expediency. Its justification from a legal point of view is more doubtful.

While it is not difficult to appreciate the attitude of the Section, there is nothing more dangerous than the standpoint from which, on occasion, certain governments have regarded the petition. We find, for instance, in a Polish note of August 22, 1923, on the subject of petitions from international organizations, the following remarkable statement:

"Petitions of this kind constitute an unwarrantable interference by third parties in the internal affairs of a sovereign and independent state. The Treaties for the Protection of Minorities have merely established relations between the state concerned and the states members of the Council of the League of Nations. They have created for the state concerned certain obligations towards minorities.[1] These minorities are the only persons who benefit thereby or who are entitled to insist on the carrying out of these obligations within the limits of a procedure laid down by the provisions of the treaties themselves. Any intervention by a state member of the Council of the League of Nations under the terms of Article 12 must necessarily be based on a corresponding request received from the minority itself."[2]

At the bottom of the Polish objection is the fact that it classed together as being of a similar nature the seising of the Council by one of its members and the submission of a petition. When it is remembered that the former is the exercise of a definite legal right, with definite legal consequences, whereas the latter consists simply in the sending of information which the members of the Council will use or ignore, as they please, the objection ceases to have any value.

B. Any one may submit a Petition

It follows from the merely informatory character of the petition that "in principle everybody is free to petition the League in minorities matters".[3] It is immaterial whether a petition comes from the minority concerned or from a third party not directly interested in the question.[4] Information remains information whatever its origin. The petitioner is not a party to a lawsuit between himself and the state concerned, acting in the protection of his

[1] The obligations are "in respect of" minorities, not "towards" them.

[2] See *O.J.*, September, 1923, pp. 1071–2. See also speech of M. Briand in Supplement No. 73 to *O.J.*, p. 15, and M. Titulesco, *ibid.*, p. 13.

[3] See Note of the Secretary-General to the 40th Session of the Council, June 10, 1926: Annex 885 to Minutes of the 40th Session.

[4] Adatci Report, Supplement No. 73 to *O.J.*, p. 60.

rights against that state, but merely a source of information for the members of the Council to assist them in exercising their rights and duties under the treaties.[1]

This point is well brought out in the Rio Branco Report on the Polish note of August 22, 1923, already mentioned. The note urged that petitions from international organizations should not be submitted to the ordinary procedure because they did not emanate from the minorities themselves: "Any interference by other bodies, whatever their character may be, must be excluded at the outset, and cannot become the starting-point of any procedure."[2] The comment of M. de Rio Branco was short but effective. "I have already explained", he said, "that, as these petitions are merely sources of information for the members of the Council, they may in principle emanate from any source whatever without other restrictions than those which the Council itself may see fit to impose."[3]

Petitions, therefore, may emanate from any source whatever and not merely from persons belonging to the minorities. Moreover no distinction can be made between petitions emanating from minorities and those emanating from other sources. All are information and there are no degrees of informatory character. Here again the Polish note of August 22, 1923, provides a convenient illustration of the mistaken view. After putting forward the arguments criticized above, the note went on: "Communications received from international organizations concerning the protection of minorities cannot be regarded as constituting anything more than subsidiary documents of an informatory character, when compared with petitions addressed by minorities."

It is obviously not in the nature of communications which are all mere information that some should be subsidiary and others principal. Their value depends upon the reliability of the facts they contain and not on their origin. Though this latter may be relevant in judging the credibility of a piece of information, it is quite inaccurate to suggest that there can be any degrees of informatory character of the kind suggested in the Polish note.

C. Petitions do not come from Minorities as Legal Entities with International Personality

Petitions, therefore, being mere information, may be sent by any individual, organization, or state whatsoever. There can be

See note 3 on p. 79.

[2] See *O.J.*, September, 1923, pp. 1071–2.

[3] See Annex 558 to the Minutes of the 26th Session of the Council.

no question of the petition being the monopoly of individuals belonging to the minorities, much less that of the minorities as organized entities. This point is clearly made in a note of the Czechoslovak Government, dated April 5, 1923,[1] which insisted that although the Tittoni Report said that the right of members of the Council to call attention to any infraction did not in any way exclude the right of the minorities themselves to forward to the League petitions or reports, the Czechoslovak Government understood the expression "the minorities themselves" to be a mere abbreviation of the words which occur in the treaties—"Persons belonging to racial, religious, or linguistic minorities". "The minorities treaties", the note continues, "did not create organizations possessing the right to speak and act on behalf of the 'minorities' but placed their protection in the hands of the members of the Council." The Council approved this interpretation and there can be no doubt as to its soundness. Minorities do not exist as organized entities with international personality for the purpose of petitioning the League or for any other purpose. The framers of the treaties at Paris rightly or wrongly refused to concede any such status to minority populations. It is not open to the Council, even if it so desired, to reverse that decision.

There is no difference between a petition from an individual member of a minority and one from a powerful minority organization.[2] Both simply supply information, and there are no degrees in informatory character.

D. Conclusion as to the Nature of the Petition

The petition, therefore, with which the preliminary procedure is concerned, is nothing more than a piece of information alleging an infraction or danger of infraction of the provisions of a minori-

[1] See *O.J.*, July, 1923, pp. 717–8.

[2] The international personality of a minority organization here in question must not be confused with the right of autonomy which the treaties confer upon certain minorities. That autonomy merely gives a status within the state concerned and does not change its situation *vis-à-vis* the outside world.

It is this status or autonomy within the state to which Fauchille (*Traité*, I, 806) refers when he says: "There are formulated for the first time rights of minorities as sueh, as organized unities. We no longer confine ourselves to considering the rights of minorities as individual rights. The minority is regarded as a whole, and this minority is recognised to have a right of organisation or autonomy." Count de Mello Franco used the above extract in his Declaration before the Council on December 9, 1925 (Minutes of the 37th Session of the Council) in criticizing the Hungarian proposal to give minorities the right to appear before the Council. He seemed to regard it as relevant to the question of the international status of minorities. It is submitted that it is not so, but concerns only status or autonomy within the state.

ties treaty. It need not be couched in any particular form, nor need it emanate from any particular source. It is not a legal document, nor does its submission produce any new legal situation.

E. The Tests of Receivability of Minorities Petitions

The Secretariat acknowledges the receipt of minorities petitions if sufficient address is given.[1] This is naturally always the case where the petition emanates from the government of a state not a member of the Council. In the case of private petitions, however, it may well happen that the petitioner would, for obvious reasons, not disclose his address; in that case no acknowledgement is possible. It will be seen later that the mere suppression of the petitioner's address, providing that the petition is not anonymous or is otherwise sufficiently authenticated, will not make the petition non-receivable.

The acknowledgement of receipt is entirely formal and only states the fact that the petition has reached the League.

As soon as it is received, every petition is examined by the Minorities Section with a view to ascertaining whether it fulfils the conditions of receivability laid down in the Council resolution of September 5, 1923 (Section 2).

The conditions there laid down are indications to the Secretariat of the general characteristics which information must have in order to be submitted to the procedure in force. These characteristics are so clearly necessary that, even before the resolution, all but one[2] were in practice applied by the Secretariat to information sent to the League.

The resolution provides that—

"In order that they may be submitted to the procedure established by the Council resolutions dated October 22 and 25, 1920, and June 27, 1921, petitions addressed to the League of Nations concerning the protection of minorities:

"(*a*) must have in view the protection of minorities in accordance with the treaties;

"(*b*) in particular, must not be submitted in the form of a request for the severance of political relations between the minority in question and the state of which it forms a part;

"(*c*) must not emanate from an anonymous or unauthenticated source;

"(*d*) must abstain from violent language;

"(*e*) must contain information or refer to facts which have not recently been the subject of a petition submitted to the ordinary procedure."

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[1] See on this and on the whole of the present subject a Note by the Secretary-General to the 40th Session of the Council dated June 10, 1926, and being Annex 885 to the Minutes of the Session. Also Adatci Report, Supplement No. 73 to *O.J.*, pp. 57–8.

[2] Condition (*e*) in the text.

The Adatci Report of 1929 classifies these conditions as follows:[1]

1. As to origin. The petition must not emanate from an anonymous or unauthenticated source.

2. As to form. The petition must abstain from violent language.

3. As to content:

(*a*) The petition must have in view the protection of minorities in accordance with the treaties.

(*b*) In particular it must not be submitted in the form of a request for severance of political relations between the minority in question and the state of which it forms a part.

(*c*) It must contain information or refer to facts which have not recently been the subject of a petition submitted to the ordinary procedure.

This classification is in one sense a useful one. In another, however, it is artificial and, indeed, misleading. All the conditions, accurately speaking, are concerned merely with the form of the petition. The provision as to anonymity and unauthenticity does not really touch the question of the origin of a petition, but only that of its form. Does it purport to be signed by some person in existence? is the only question to be answered. Every one is free to petition the League, and all that the resolution requires is that he must not do so anonymously. The Adatci Report virtually admits this when it concludes that "in principle *any signed petition* is regarded as emanating from an authenticated source. In certain cases petitions sent by telegram have been regarded as acceptable even before being confirmed by letter."[2]

The same considerations apply with even more force to the three conditions which the Report classifies as relating to content. It is not the duty of the Secretariat to do anything more than see that—

(*a*) the petition *purports* to have in view the protection of minorities in accordance with the treaties;

(*b*) it is not submitted *in the form of* a request for the severance of political relations between the minority in question and the state of which it forms a part, and

(*c*) that it contains information or refers to facts which have not recently been the subject of a petition submitted to the ordinary procedure.

[1] See Supplement No. 73 to *O.J.*, p. 57.

[2] *Ibid.*

If we may again quote the words of the Report: "The Secretary-General has merely to carry out a cursory examination of the facts and information submitted by the petitioner. *He cannot verify any of the facts or even undertake to examine the substance of the question raised in the petition.* In principle, where the statement of facts in a petition is *prima facie* in accordance with the three conditions required, it is declared acceptable."[1]

It is most important to make clear that the work of the Secretariat is merely to examine the form of the petition and not the questions of substance which inevitably arise out of the allegations it contains. Unless this is done the whole of the preliminary procedure will seem to lack coherence and reason.

This is brought out in the Council discussion on June 6, 1928, concerning the receivability of a petition from certain Ukrainians in Lithuania. That discussion will be examined later at length, but it might be useful to give, at this point, an account of the final view taken by the Council.

It is well expressed in the following words of M. Procopé (Finland):

"In my view," he said, "a distinction should be made in this case between questions of form and questions of substance. The resolution of Sept. 5, 1923 laid down certain standards for judging the receivability of minority petitions. These standards dealt in their essence with questions of form and not with questions of substance. . . . The essential condition is that the object of the petition shall be the protection of a minority in conformity with a treaty, that is to say, that the petitioners shall *invoke* the provisions of a treaty or of an international obligation as a basis for their petition. The question whether this obligation or this treaty is really applicable in the present case constitutes a question of principle which it is not for us to examine when we are considering the receivability of the petition. We have merely to confine ourselves to noting that the petition is based on a treaty or on an international obligation."[2]

This view, expressed at length by M. Procopé, was expressed again more shortly by a Committee of Jurists whose opinion was given at a meeting of the 51st Session of the Council, held on September 8, 1928:[3]

"In judging the receivability of a petition which requests the League of Nations for protection against the Government of a State bound by the special obligations of a minorities treaty, it is not the truth or falsehood of the allegations contained in the petition which should be examined, but only the manner of

[1] See Supplement No. 73 to *O.J.*, p. 57.
[2] See Minutes of the 50th Session of the Council, Meeting of June 6, 1928.
[3] Document C. 473, 1928, 1.

their presentation and their pertinence in the light of the conditions laid down in the resolution of Sept. 5, 1923."

The nature of the tests being thus defined, attention may be directed to the manner in which each test is applied in practice.

The first and second, requiring respectively that the petition shall have in view the protection of minorities in accordance with the treaties, and that it shall not take the form of a request for the political severance of the minority from the state concerned, are closely connected and may be taken together. The second, as the resolution itself points out, is merely one example of the first. For the basis of the minorities treaties is a certain territorial settlement, and a request for modification of that settlement is clearly not made with a view to the protection of minorities in accordance with the treaties.

As to both, the main point to be grasped is that it is not for the Section to examine the petition on the merits, to see, for instance, whether any treaty does actually apply, but merely to look at the form of the petition. In the first place, does it invoke the provisions of some treaty or declaration for the protection of minorities? In the second place, is it framed as a request for severance of political relations? These questions can be answered by a mere cursory examination of the facts and information submitted by the petitioner; they are questions of form.

The matter is put rather differently in the report given by M. Urrutia on June 6, 1928, in the Lithuanian case already referred to. "What we are required to do", he said, "is to settle a preliminary point of a superficial character, namely, whether the petition presents a strong enough *prima facie* case to be communicated to the members of the Council individually, as a purely informative measure."[1] This mode of expression is a dangerous one. To decide whether there is a *prima facie* case requires an examination, albeit slight, into the merits. Such an examination is undesirable from two points of view.

Firstly, it would give the Section, which is an administrative body, quasi-judicial functions. Secondly, it would produce the result that when the Council considered the objection of the state concerned to the acceptance of a petition it would have to go into the merits of the case. Such a result is not only undesirable, but is also at variance with paragraph 2 of Article 12 of the treaty, which limits the consideration by the Council of infractions to cases where it has been seised by one of its members. It could

[1] See Minutes of the 50th Session of the Council, Meeting of June 6, 1928.

scarcely have been intended that the resolution of September 5, 1923, should modify the treaty; but this will result if the words of M. Urrutia are taken as an accurate description of the position.

This conclusion on principle is confirmed by the passage, which has been quoted, from the Jurists' Report of September 8, 1928. It is also supported by the fact that the Adatci Report when dealing with this topic, while using the words "*prima facie*", is careful to modify the sentence of M. Urrutia. The latter had said that the Section must see whether "the petition presents a strong enough *prima facie* case, &c." The Adatci Report says that the Section must see whether "the statement of facts in a petition is *prima facie* in accordance with the three conditions",[1] that is, with the two under discussion and also the fifth.

It will be seen that this statement meets our objection to that of M. Urrutia. It only requires the Section to see whether the petition conforms with the three conditions, and these conditions are merely a matter of form.

What has been said as to the first two conditions applies equally to the remaining three. The first of these requires that petitions must not emanate from an anonymous or unauthenticated source; it is clear that all that this means is that the petition shall be signed. "In principle any signed petition is regarded as emanating from an authenticated source."[2] Nothing could be more a matter of form and less a matter of substance.

The fourth condition is that the petition shall abstain from violent language. It calls for only one remark, namely, that in applying it the Section takes into account the fact that the petition may come from "persons belonging to populations of primitive culture, in which case, obviously, their wording cannot be judged according to the strictest standards".[3]

The fifth and last condition laid down by the resolution of September 5, 1923, calls for more lengthy treatment. The first four, it will be recalled, were applied in practice by the Section even before the Council resolution. The last, however, was new in 1923, being the result of a suggestion of the Czechoslovak Government in a Note dated April 5, 1923.[4] Its object was to prevent the abuse of the preliminary procedure by persons or organizations whose motives were rather propagandist in nature than directed towards the protection of minorities. To such persons the automatic character of the communication of petitions to members of

[1] See Supplement No. 73 to *O.J.*, p. 58.
[2] *Ibid.*, p. 57.
[3] *Ibid.*
[4] See *O.J.*, July 1923, pp. 717–18.

the Council afforded an admirable opportunity of canvassing for political support by repeatedly bringing forward the same complaints.

Apart from the condition suggested by Czechoslovakia, every piece of information in the form of a petition which fulfilled the four requirements already enumerated had to be communicated to members of the Council and studied by a Minorities Committee. This was so even though that same information had already been submitted to that procedure in an earlier petition, and irrespective of whether any action had been taken on it. This was obviously undesirable, and another requirement was therefore added, to the effect that a petition was not to be submitted to the procedure in force unless it contained information or referred to facts not recently the subject of a petition submitted to that procedure.

Here again it is not the duty of the Section to look at the merits of a petition, but merely at its form.[1] It cannot go into the facts but can only make certain that some, not necessarily all or even most, of the information given or of the facts alleged have not recently been submitted to the ordinary procedure.

F. Conclusion as to the Tests of Receivability of Petitions

In respect of all these tests of receivability, therefore, the truth of our opening remarks is apparent. They are all concerned with matters of form; none of them either authorizes or directs the Section to look, however superficially, into the substance of the complaint it contains.

One further point may be noticed which also applies to the entire examination of petitions by the Section.

Petitions are but information, and rules concerning them can scarcely have the rigidity of rules of law. The conditions of receivability are, in effect, directions to the Section as to the kind of information suitable for submission to the procedure in force. It follows from these two considerations that the conditions

[1] For an example of the enforcement of the fifth condition of receivability, see *O.J.*, November 1922, Report of M. da Gama on the question of the German Settlers in Poland:

"I should mention, as a matter of interest, that the Union of Tenants of the State Domains in Poland has sent to the Secretariat of the League of Nations a copy of a petition. . . . This petition has not been communicated to the members of the Council, because it contained the same statements, generally speaking, as those contained in the petition to the League of Nations dated May 26, 1921, which was communicated to all the members of the Council and of the League, and which is referred to in the Report of May 17, 1922."

governing acceptance must be given a very broad interpretation, and that the Section has a fair amount of discretion in applying them. This discretion is not a dangerous one, since the Section does not consider more than the form of the petition. It is, on the other hand, beneficial, in that it gives a certain amount of latitude, within a defined sphere, to a body of experts well able to exercise it.

G. The Case of the Ukrainians in Lithuania[1]

All that has been said about the conditions of receivability and their application is so well illustrated by the case of the Ukrainians in Lithuania, that a narrative account of that case, and the discussions to which it gave rise, would serve to render more definite the general remarks which have occupied the foregoing pages.

On November 14, 1927, the Secretary-General received a petition dated the 2nd day of November 1927 and signed by twenty-one persons of Ukrainian origin, living in Lithuania. The signatories of this petition stated therein that they were Ukrainians from Kieff who had been living since 1910 and 1912 in Lithuania, where they had purchased land. When Lithuania became independent, they agreed (so the petition stated) to the request of the local police that they should become Lithuanian citizens. The Lithuanian Government, however, declared shortly afterwards that they were foreigners and that the Lithuanian Government was going to take possession of their lands. This was done, in spite of the repeated protests of the interested parties.

The petitioners declared that, as their land and houses had been divided amongst Lithuanians, they themselves were in a state of absolute poverty and destitution.

The petition went on to affirm that Lithuanians who purchased lands, under the same conditions as they, had met with no difficulties from the Lithuanian Government, and that the measures of which they complained had been applied to them because they were Ukrainians.[2]

On December 3, 1927, the Secretary-General, who considered that this petition fulfilled the conditions of receivability laid down in the resolution of September 5, 1923, forwarded it to the Lithuanian Government for its observations. The attitude of the Secretariat was essentially the one which we have attempted to

[1] See Minutes of the 50th Session of the Council, Meeting of June 6, 1928. M. Urrutia's Report is contained in Document C. 265, 1928, 1.

[2] This statement of the facts is taken from the Report of M. Urrutia.

describe, namely, that the function of the Section was to look at the form of the petition and not at its substance.

Lithuania had undertaken obligations in respect of her minorities by a Declaration made before the Council on May 12, 1922. The petition alleged a breach of this Declaration, which conferred security in the enjoyment of civil and political rights upon all Lithuanian nationals (Article 4), and assured to Lithuanian nationals belonging to racial, linguistic, or religious minorities "the same treatment and security in law and in fact as other Lithuanian nationals" (Article 5). The petition was signed, and therefore duly authenticated; it was not couched in violent or irredentist terms, and it referred to facts which had not recently been submitted to the ordinary procedure. In short, it satisfied all the tests of receivability.

The Lithuanian Government, on receipt of the petition sent to it for its comments, contested the acceptability of the petition by sending a formal objection to the Secretariat in conformity with Section 1, paragraph 2, of the resolution of September 5, 1923. This paragraph provides that—

> "If the interested state raises for any reason an objection against the acceptance of a petition, the Secretary-General shall submit the question of acceptance to the President of the Council, who may invite two other members of the Council to assist him in the consideration of this question. If the state concerned so requests, this question of procedure shall be included in the agenda of the Council."

In accordance with this paragraph the question of acceptance was thereupon submitted by the Secretary-General to the Acting-President of the Council, M. Urrutia.

According to the resolution the President may ask two other members to act with him. He need not do so, however, and in the present case M. Urrutia acted alone. He came to the conclusion that "the petition should not be considered as non-receivable for the reasons given by the Lithuanian Government". This decision was transmitted, again through the Secretary-General, to the Lithuanian Government.

That Government, being unwilling to accept the ruling of the Acting-President, requested that in accordance with paragraph 2 of Section 1 the question of acceptance should be included in the Council's agenda.

The question is described in the Lithuanian letter as being that of the "receivability of petitions concerning persons resident in a state, and not belonging to a minority of race, language, or

religion". While raising no objections with regard to the other conditions, the Government seems, therefore, to have maintained that in this case the first condition was not satisfied; that is to say, that the petition did not "have in view the protection of minorities in accordance with the treaties" or declarations.[1]

The matter having been placed on the agenda, all the members of the Council were supplied with copies of the relevant documents[2] in preparation for discussion.[3] The discussion took place on June 6, 1928, at the 50th Session of the Council.

The Lithuanian representative, M. Voldemaras, having been invited to come to the Council table in accordance with Article 4, paragraph 5, of the Covenant, M. Urrutia read a Report which set out the facts detailed above, and stated the principles at stake and the arguments of the Lithuanian Government.

"In my view," he said, "the Council is called upon to decide whether the petition of November 2, 1927, is receivable. As the resolution of September 5, 1923, states, this question is one of procedure. We are not required in this case to take a decision on the substance of the matter, on the existence of a breach, or threat of a breach, of obligations towards minorities. What we are required to do is to settle a preliminary point, of a superficial character. . . . It will be seen that we are a long way from the consideration by the Council of the validity of the complaints in the petition."

To use our own expression, the resolution does not require the Council on such an appeal to look at anything but the form of the petition, and certainly does not justify any examination of the substance, that is, of the truth or falsehood of the allegations which it contains.

The arguments of the Lithuanian Government and the discussion which took place upon them are equally interesting from either of two points of view. In the first place, they lay open to view the pitfalls always ready for those who have not grasped the true nature of the preliminary procedure. In the second place, they show the unerring accuracy with which the Council seems to emerge out of a maze of fallacies[4] and arrive at a conclusion of which the soundness cannot be questioned. The following analysis

[1] See letter of June 24, 1928.

[2] Document C. 202, 1928, 1.

[3] Of course, after the discussion in the Council all the documents become public.

[4] For examples of such fallacies outside the speech of the Lithuanian representative, see the speech of M. Scialoja and his curious hypothetical case of a petition presented by an Italian under the guise of a Siamese against the Government of Siam.

will attempt to give some idea of both these aspects of the speeches made and the decisions taken.

Lithuania put forward four grounds for her objection to the acceptance of the petition, all of which were discredited by the final decision and two of which never even had the semblance of solidity.

Her first argument was that the petition purported to come from members of a Ukrainian minority in Lithuania, whereas such a minority did not in fact exist. A minority, according to M. Voldemaras, must have the two following characteristics.

1. It must belong to the country permanently, i.e. by origin.
2. It must be sufficiently numerous to constitute an appreciable percentage of the country's population.

M. Urrutia's criticism of this assertion is highly damaging. In the first place, he said, the Declaration of May 1922 speaks of nationals generally, and makes no mention of any special nationality of origin. If these Ukrainians were Lithuanian nationals (as they alleged they were), the Declaration applied to them whatever their origin. In the second place the Declaration lays down no rule regarding the numbers of those concerned. Minority protection is expressly granted to "all Lithuanian nationals" (Article 4, paragraph 1), and to "any Lithuanian national" (Article 4, paragraph 3). It is also stipulated (Article 6, paragraph 2) that "differences of religion, creed, or confession will not prejudice any Lithuanian national". Further, when importance is attached in the Declaration to the number of beneficiaries, this is formally stated, as in Articles 6 and 7, which deal with the allotment of public funds for educational purposes.

His principal ground having thus failed, the Lithuanian representative proceeded to put forward other arguments verbally. He said, in effect, that even admitting that the two characteristics were not necessary for the existence of a minority, it was still the fact that the persons whose rights were in dispute were not Lithuanian nationals, and were not entitled to the protection given by the Declaration.

There seems, at first, to be something in this point. The only provision as to nationality in the Declaration of May 12, 1922, is that "all persons born within the territory of the Lithuanian state subsequent to the coming into force of the present Declaration who cannot claim another nationality by birth shall be recognized as Lithuanian nationals" (Article 3, paragraph 2). The Declaration is in this respect much narrower than the various treaties. For

instance, the Polish treaty gives nationality also to "German, Austrian, Hungarian, or Russian nationals habitually resident at the date of the coming into force of the treaty in territory which is or may be recognized as forming part of Poland" (Article 3, paragraph 1).

Moreover, as M. Voldemaras pointed out, the petitioners did not fall within the law giving nationality to persons who had lived in Lithuania for at least ten years before the war. He submitted that they were not Lithuanian nationals, and not entitled to protection under the Declaration.

The argument is a somewhat plausible one and required careful scrutiny. Such a scrutiny revealed instantly a fatal flaw. What M. Voldemaras said in effect was this: "These petitioners claim in their petition that they are Lithuanian nationals. If, however, the Secretariat had looked into the facts, or if the Acting-President had done so, they would have discovered that they were not Lithuanian nationals."

Now this might or might not have been so; but even if it were so it would have been irrelevant when the *form* merely and not the *substance* of the petition was being examined. The conditions of receivability concern the form only of the petition. The Minorities Section has neither the right nor the duty to investigate the truth of an allegation contained in the petition. It may only look at the form, and in the case under discussion that form undoubtedly indicated that the Ukrainians were Lithuanian nationals. That being so, the condition of receivability was fulfilled, and the decision of the Secretariat was correct.

The position is lucidly stated by M. Procopé (Finland), whose speech has already been quoted at some length. He concluded, "The argument submitted by M. Voldemaras to the effect that no Ukrainian minority exists in Lithuania is an argument affecting the question of substance. . . . The above question is in no way connected with the formal conditions laid down in the resolution of September 5, 1923. I think that the fact that a petition is declared receivable does not settle the question whether an ethnical, religious, or linguistic minority has in fact submitted the petition."

Driven, therefore, from this second ground, the Lithuanian representative put forward two further arguments which need only be stated for their invalidity to be made patent.

The first was as follows. "To declare such a petition as the present one to be receivable means that the Government is

required to appear at the bar of the League of Nations . . . only to find that the petitioner does not exist. Such a procedure is entirely opposed to the procedure followed in penal and civil matters according to the generally recognized legal practice. It is for the plaintiffs to prove that they actually exist and are really Ukrainians.[1] It is not for the Lithuanian Government to prove that they do not exist."

The answer to this is that there is no question of any "appearance at the bar of the League of Nations" until the Council has been seised under the relevant paragraph of the treaty or declaration.[2] The activities of the Minorities Committees have no judicial character at all. Moreover, even when the judicial stage has been reached, the parties are not the State and the Minority, but the State and the Council. Minority and State are never in the legal position of plaintiff and defendant.

Finally, urged M. Voldemaras, "the plaintiffs are not appealing to the civil court[3] but to an institution—the League of Nations—which is of great political and international importance. They ask it to defend their civil rights and not their political rights. They do not say that they are subjected to persecution on account of their language or their religion, but that their land has been taken away from them. . . . The Government is in a position to realize from the petition itself that the matter concerns civil and not public law. It is for this reason that the Lithuanian Government considers that the petition should be declared irreceivable."

A glance at any of the minorities treaties or declarations will show that they deal with civil as well as political rights. It is clear that the fact that a question might conceivably be raised under the civil code does not prevent it being raised under the treaties or declarations. This fourth Lithuanian ground did not survive the slightest examination.

After this long discussion the Council adopted two resolutions. In the first, the proposal of M. Urrutia that the petition be held receivable was adopted. In the second the proposal of M. Paul-Boncour received approval. This was that the concrete point of procedure raised by Lithuania be submitted to a Committee of Jurists for examination.

The Report of this Committee[4] was given on September 8,1928,

[1] Probably an error for "Lithuanians".
[2] Paragraph 2 of Article 9 of the Lithuanian Declaration.
[3] Presumably of the state concerned, Lithuania.
[4] Consisting of MM. Djuvara, François, Fromageot, Gaus, Pilotti.

at the 51st Session of the Council. The serenity of its terms is a fitting conclusion to the present complicated narrative.

"In judging of the receivability of a petition which requests the League of Nations for protection against the Government of a State bound by the special obligations of a minorities treaty, it is not the truth or falsehood of the allegations contained in the petition which should be examined, but only the manner of their presentation and their pertinence in the light of the conditions laid down in the resolution of September 5, 1923.

"In the case of the petition which was the subject of the Council's decision of June 6 and 9, 1928, it does not appear that . . . the objections raised by the Lithuanian Government, including those concerning the truth of the allegations, were such as to require that this petition should not be received."

RECOGNITION OF FOREIGN LAWS BY MUNICIPAL COURTS

By ALEXANDER P. FACHIRI

FEW subjects are more complex and difficult than the "conflict of laws", and I hasten to disclaim any intention of discussing the topic in general. The following remarks are prompted by certain decisions of our courts relating to the effect of Russian Soviet legislation, and consist of reflections arising out of those cases.

The cases I have in mind are three in number[1] and it is best to recall them briefly at the outset.

The first, and most important, is *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532. Here the Court of Appeal decided that legislation of the Soviet Government, which had then been recognized by His Majesty's Government, appropriating without compensation the property in Russia of a Russian national must be recognized and given effect to in this country. The facts were, briefly, that a quantity of wood belonging to the plaintiffs at their saw-mills in Russia was declared to be the property of the Russian State by a decree of "nationalization" passed in 1918, and the wood was then sold by the Russian Trade Delegation in London to the defendants, a London firm, who imported it into England; whereupon the plaintiffs started an action here, claiming that the wood was their property. The Court of Appeal held that the defendants had acquired a valid title and were entitled to judgment.

With this case must be bracketed *Princess Paley* v. *Weisz*, [1929] 1 K.B. 718 which laid down the same principle in a similar state of facts. The property there consisted of works of art belonging to the plaintiff, confiscated by the Russian Government and sold to the defendants, who brought them to England. The Court again upheld the defendants' title.

In the third case, the *Jupiter* (No. 3), [1927] P. 122; 250, Hill J. held that the confiscatory Soviet legislation did not operate to transfer property situate outside the territory subject to the sovereignty of the Russian Government. The facts were that the *Jupiter*, a vessel belonging to a Russian steamship company, was

[1] I do not deal with cases such as *Russian Commercial Bank* v. *Comptoir d'Escompte*, [1925] A.C. 112; *Employers' Liability Assurance* v. *Sedgwick Collins & Co.*, [1927] A.C. 95, which raise points different from the ones here discussed.

at Odessa in the early part of 1918 when Soviet decrees confiscating Russian ships for the benefit of the state were passed. She subsequently left that port under the control of her original owners or persons acting in their name and engaged in trade to various ports outside Russia. On March 9, 1924, the master of the *Jupiter*, which was then at Dartmouth, handed her over to representatives in England of the Soviet Government, who took possession of her, and ultimately sold and delivered her to an Italian company. Other proceedings with regard to the ship, which are not now relevant, took place in the English and French courts, but in the present case the representatives of the original owners instituted an action *in rem* for possession, which was opposed by the Italian company. Hill J. found as a fact that Odessa was not, at the date of the confiscatory decrees, under the sovereignty of the Soviet Government, and held that the decrees, therefore, could not transfer the property in the *Jupiter* to the Soviet Government, the consequence being that the sale by that Government to the defendants conferred no valid title upon them, and he ordered her restoration to the plaintiffs.[1] The Court of Appeal affirmed this judgment.

The first question suggested by these cases is the general one: What is the basis upon which our courts, and other municipal tribunals, apply the laws of a foreign country? Of course, the formal answer is that municipal courts do not really apply foreign laws, but merely give effect, in appropriate cases, by virtue of their own municipal law, to rights acquired under foreign laws. This is perfectly true, and, in dealing with any particular case in our courts, neither judge nor counsel need as a rule consider anything more than the precedents that constitute the English law on the subject, which have been so admirably co-ordinated in works like Dicey's *Conflict of Laws*. But if one asks, Why do the courts have regard to foreign laws? the difficulties begin. Different explanations are given. The older school, of which Story is the outstanding exponent, based this regard on international comity, and his great influence upon English and American judges is reflected in the cases. The leading modern English writers like Dicey and Westlake do not admit the importance of comity and seem anxious to divorce their subject from any international principle. Certain contemporary Continental authorities, on the other hand, go to the other extreme and, not satisfied with comity as a basis, hold that private international law is a part of the true law of nations.

[1] Hill J. adjudged the vessel to the administrator appointed by the French Courts, whom he held to be the person entitled to legal possession.

Pillet's brilliant argument in support of this thesis is particularly noteworthy.[1]

This diversity of ideas is somewhat bewildering, but consideration of the matter in relation to the above cases suggests certain conclusions. First, it is obvious that it would have been impossible for the Court to decide the *Luther*, *Paley*, or *Jupiter* case without considering the validity and operation of the Soviet laws. It is sometimes said in the books that courts are free to regard or disregard foreign laws, and that if they do regard them it is merely a matter of convenience and their own sense of justice, according to one view, or a matter of comity, according to another. But in these cases the issues could not have been decided at all, in any judicial sense, on the basis of the internal law of England. How could the title to the pictures, in the *Paley* case for example, have been determined without reference to past and present Russian law? Any attempt to adjudicate upon this point by application of the rules of English law would have been a mere fiction. There was a compelling judicial necessity in all these cases to consider and apply foreign law.

But the application of foreign law was also an international duty. In order to test the matter, suppose that the Soviet Government was a normal civilized Government and their legislation such as one expects from a Government of that character. What would be the duty of Great Britain towards Russia in the administration of justice in actions raising questions of the kind involved in these cases? To say that international courtesy would require the application of Russian law is putting it too mildly. It may be that there is no obligation binding as a matter of public international law to have regard to the foreign law in such cases, but if not, it is surely an obligation not far short of this, for the intercourse of modern nations is built up on the assumption that rights acquired in one state belonging to the international community will be recognized by the others. "Comity" is a convenient term for this obligation if used in a wide, somewhat loose, sense. The best exposition of the meaning of comity appears to me to be that given by Gray J. in delivering the judgment of the Supreme Court of the U.S. in *Hulton* v. *Guyot*:[2]

"No law has any effect of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act,

[1] *Principes de Droit International Privé*, Ch. III.

[2] (1895) 159 U.S. 113, at p. 163.

or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations'. Although the phrase has often been criticized, no satisfactory substitute has been suggested. 'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or the persons who are under the protection of its laws."

It appears then that the general principle that foreign law must be applied by a municipal court when it governs the rights of the parties is, in cases of the character now in question, a necessary condition of doing justice and also an international duty. But this principle has certain exceptions. In the first place, no state can be expected to give effect within its territorial jurisdiction to a foreign law that is contrary to its own public policy or essential principles of morality, and its courts will accordingly refuse to apply such laws.[1] Secondly, a foreign law that is contrary to international law[2] or in flagrant violation of international comity[3] need not be regarded. These two exceptions result from the nature of states and the reason of the thing. The third, the reason for which is not so apparent, is that the penal laws (using the expression in a very wide sense) of one country will not be enforced within the jurisdiction of another. This exception is based in the books upon the strictly territorial character of penal laws at international law.[4]

Returning to the cases under discussion, I have endeavoured to answer the question as to the reason why our courts had to have regard to the Soviet legislation, and have stressed the international side of the obligation. But there is a further point, to which I desire to draw attention, namely, that in each of these cases the effect to be attributed to the foreign legislation raised questions of public international law. In saying this, I am not referring to the points that arose as to the international position of *de facto* governments, with which I am not now concerned, but to the fact that the effect of the legislation depended upon the rules of public international law as to legislative competence. Thus, the *Luther* case is based on

[1] *Kaufman* v. *Gerson*, [1904] 1 K.B. 591; *In re Fitzgerald*, [1904] 1 Ch. 573, at p. 597; *Sommersett's case* (1772), 20 St. Tr. 1; *Forbes* v. *Cochrane* (1824), 2 B.&C. 448; *Henderson* v. *Henderson* (1844), 6 Q.B. 288, at p. 298.

[2] See below.

[3] *Simpson* v. *Fogo*, 1 J.&H. 18.

[4] See *Huntingdon* v. *Attrill*, [1893] A.C. 150. The same applies to foreign laws creating a "penal" status not recognized here; *Worms* v. *de Valder*, [1880] 49 L.J. (Ch.) 261.

the principle of international law that states have exclusive legislative jurisdiction over property within their territory, whilst the *Jupiter* case proceeds upon the corresponding principle that the legislative competence of the state at international law does not extend to property outside its territory.

I pass now to a closer examination of the *Luther* case. The vital factor in the Court of Appeal was the recognition by the British Government of the Russian Government. This was qualified by the statement that such recognition was of the Soviet Government as the *de facto* Government of Russia, but, as the Court pointed out, there is really no distinction as regards the effects at international law between recognition of a Government *de facto* and unqualified recognition. The case can, therefore, be considered on the same footing as if the foreign Government, whose laws were in question, was an ordinary, civilized, duly recognized member of the international community. One of the arguments advanced by the plaintiffs, the original owners of the disputed property, was that the decree of confiscation was in its nature so immoral and so contrary to the principles of justice recognized by this country that our courts ought not to pay any attention to it, even if the Government enacting the decree was a duly recognized one. All the members of the Court of Appeal rejected this contention and they did so really on the ground that they had no power to disregard the decree on this ground. Bankes L. J. at p. 545 observed:

"the question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope* v. *Hope*[1] and *Kaufman* v. *Gerson*.[2] The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under an f.o.b. contract for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention."

Warrington L. J. at p. 548 said:

"The question then is whether the Court has any power to question the validity of the proceedings under which the property in the goods has *prima facie* been transferred to the defendants. . . . It is well settled that the validity of acts of an independent sovereign Government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country."

And later, referring to the plaintiffs' argument based upon the immorality of the decree, he stated that the principle enunciated

[1] (1857) 8 D.M.&G. 731.

[2] [1904] 1 K.B. 591.

in such cases as *Kaufman* v. *Gerson* had no application. The appellants

"are resisting an endeavour on the part of the respondents to induce the Court to ignore and override legislative and executive acts of the Government of Russia and its agents affecting the title to property in that country; it is that which, in my opinion, we are not at liberty to do."

Scrutton L. J. took what seems to be a slightly different, but no less extreme view.

"It appears (he said at p. 538) a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality. Such an allegation might well with a susceptible foreign Government become a *casus belli*; and should, in my view, be the action of the Sovereign through his Ministers and not of the judges in reference to a state which their Sovereign has recognized."

Scrutton L. J.'s view goes farther than that expressed by other English judges in the past,[1] and, with the greatest respect, it is not easy to admit the practical possibility of judicial non-recognition of a law on the ground of immorality leading to war. The opinions of the other learned Lords Justices amount to this, that our courts can never question the validity of a foreign law, or decline to give effect to it, where the law in question determines the title to property within the foreign country. The sole test seems to be legislative competence, with the consequence that all laws operating within the territorial jurisdiction of the foreign state would, on this principle, be entitled to the same absolute and unconditional respect. With the greatest deference to these learned judges, I submit that such a rule goes too far, and that there is authority against it. It is quite true that in *Santos* v. *Illidge*,[2] cited by Bankes L. J., the non-delivery of slaves in Brazil under a contract made there, which was lawful according to Brazilian law, was held actionable in England though the sale would have been criminal here; but if the property, namely, the slaves, had been brought to England by the purchaser, his rights would not have been recognized or enforced here, notwithstanding the validity of his title under Brazilian law. This follows from *Sommersett's Case* (1772), 20 St. Tr. 1, and *Forbes* v. *Cochrane* (1824), 2 B. & C. 448. Both these cases are authorities for the proposition that rights of property duly acquired in a foreign country, under that country's law, can and will, in certain circumstances, be disregarded and rendered nugatory by English courts.[3] Nor would it appear to be a

[1] See *Forbes* v. *Cochrane* (1824), 2 B.&C. 448; *Kaufman* v. *Gerson*, [1904] 1 K.B. 591; *In re Fitzgerald*, [1904] 1 Ch. 573, at p. 597. [2] (1860), 8 C.B. (N.S.) 861.

[3] See also *Cammel* v. *Sewell* [1860] L.J. (Ex.) 350. It is obvious that if Crompton J.

conclusive reason against disregarding an immoral foreign law that the assistance of the Court, as in the *Luther* case, is not being asked actively to enforce the foreign law. If the plaintiff in the *Luther* case had somehow obtained possession of the wood and was being sued by the defendant as lawful owner, the issues would have been precisely the same and the fact that the assistance of the Court would have been invoked to enforce the defendant's rights under the Soviet decree by dispossessing the plaintiff does not seem to afford any ground of distinction.

The submission I am making is that it was open to the Court, in the *Luther* case, to refuse to recognize the Soviet decree, and adjudge the property to the plantiff, on the ground that the decree was so immoral and so contrary to the principles of justice and public policy that it ought not to be recognized in this country. Whether this would have been the correct conclusion to reach is another matter. Different views are held by judges, no less than by private individuals, in regard to the confiscation of private property for the benefit of the state. Scrutton L. J. evidently thought (see at p. 559) that there was nothing obviously immoral or contrary to the practice of civilized states in the Soviet legislation. The courts of other countries before which the same question has arisen have taken up different points of view. Thus, in France, even since the recognition of the Soviet Government, the courts have quite definitely declined to give any effect whatsoever to Russian confiscatory legislation, on the ground that it is contrary to French *ordre public*.[1] The same attitude is, I understand, adopted by the courts of Russia's Baltic neighbours. In Germany, on the other hand, the Soviet nationalization decrees are accorded full recognition by the Courts.[2] These illustrations suffice to show how controversial the question is, but the same is true of many other questions depending upon social and ethical considerations. The decision must be left, in each case as it arises and having regard to all the facts, including the avowed political object of the legislation, to the judicial conscience. The point I am trying to make is simply that English law does not deprive the court of the liberty to reject the foreign law, if so advised.

It may be not without interest to consider what would be the position if the party dispossessed by the Soviet legislation was not

had thought that the Norwegian law was "barbarous or monstrous" he would have agreed with Byles J. in disregarding it.

[1] See Clunet, 1925, p. 391; 1926, p. 667.

[2] See Clunet, 1924, p. 51; 1925, p. 339.

a Russian subject. Suppose that, in the *Luther* case, the plaintiff had been a British or French national. There can be no doubt that as regards the legislative competence of Russia the position would be precisely the same—a law transferring the title to property within its territory, though such property belongs to a foreigner, is clearly within the jurisdiction of the enacting state, and, as such, entitled in other countries to the respect *prima facie* due to foreign laws. But in this case it would be possible for the English or French plaintiff to rely upon the second exception to the rule that foreign laws must be respected, viz. that the law was contrary to public international law. I do not venture to assert that this plea would be successful, but I submit that it would be available to the plaintiff and that, if he succeeded in satisfying the Court that complete confiscation of the property of foreigners is contrary to public international law, he would be entitled to judgment and the restitution of his property. The English authorities afford a few precedents of refusal to recognize foreign laws upon this ground. In *Wolff* v. *Oxholm*[1] Lord Ellenborough C. J. held that the confiscation of enemy debts in war-time was "not conformable to the usage of nations" and declined, therefore, to have regard to a Danish law passed for this purpose, and to the judgment of a Danish court based thereon. The result was that the plaintiff, an Englishman, was held entitled to recover a debt contracted by the defendant, a Dane, although the latter had paid over the sum due to the Danish Government under the aforesaid law, and the suit instituted in Denmark by the plaintiff for the recovery of the debt had been dismissed. The view of Lord Ellenborough that international law prohibits the confiscation of enemy property has been questioned,[2] but the decision that a foreign law contrary to the law of nations may be disregarded stands, and it has been followed in a modern case, *In re Fried. Krupp*, [1917] 2 Ch. 188, in respect of a German ordinance prohibiting claims for interest on debts from German to British subjects. It is noteworthy that the rights of the parties in the last-mentioned case were admittedly governed by German law.

There is no reason to confine the exception to war legislation, and there are precedents for the disregard of legislation of a different sort. In the case of *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch.D. 189, Chitty J. non-suited the plaintiff Government in an action which sought to set aside an agreement between the defen-

[1] (1817), 6 Maule & Selwyn 92.

[2] See *In re Ex Tsar of Bulgaria*, [1921] 1 Ch. 107, at p. 126.

dants and a *de facto* Government of Peru which the plaintiff Government replaced. Under the new Government an Act of Congress was passed making the acts of its predecessor null and void, but the Court disregarded this and declined to give effect to an executive resolution declaring the agreement void and without effect according to the laws of Peru, except upon certain terms advantageous to the plaintiff Government. The ground of the decision was that the plaintiff Government was bound by the acts of the former *de facto* Government, which had been recognized by Great Britain, and the Court declined to allow the plaintiff Government to approbate and reprobate as was sought to be done by the resolution. In *Republic of Peru* v. *Dreyfus Brothers & Co.* (1888), 38 Ch.D. 348, the same Government claimed certain cargoes in the hands of the defendants in pursuance of a contract between them and the former *de facto* Government, on the ground that by the law of Peru (namely the above-mentioned Act of Congress) the contract in question was void. Kay J. observed in his judgment that "it is difficult to see how [the case] can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign state may safely have such dealings as existed in this case with a Government which such state has recognized". He proceeded to consider the position of a recognized *de facto* Government at international law and, holding that the plaintiff Government was bound according to the law of nations by the acts of the preceding Government, dismissed the claim, entirely disregarding the existing Peruvian law. Now that law was clear and unambiguous and, if recognized, would undoubtedly have entitled the plaintiff Government to judgment. The only explanation of the decision is that the Court, finding that the law annulling the acts of the preceding Government was contrary to the law of nations, considered itself entitled and, indeed, bound to ignore it. And this view is clearly right. Public international law is part of the law of England[1] and it can never be the duty of an English court to give effect to a foreign law which offends against international law. The reasons for the application of foreign law alluded to above—judicial necessity, on the one hand, and comity, on the other—cannot apply in such a case. The obligation to apply public international law overrides the ordinary rules of private international law.

[1] *Triquet* v. *Bath* (1764), 3 Burrow 1478; *Emperor of Austria* v. *Day* (1861), 2 Giff. 628; *West Rand Mining Co.* v. *R.*, [1905] 2 K.B. 391, at p. 406; Lord Finlay in the *Lotus* case, P.C.I.J., Series A, No. 10, at p. 54.

Before passing from the *Luther* case, a word or two may be said about the American authorities there cited. The proposition upon which the decision of the Court of Appeal is really based was first enunciated by the Supreme Court of the U.S. in *Underhill* v. *Hernandez*:[1]

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the Government of another done within its own territory."

The claim in that case was by an American citizen against the successful leader of a Venezuelan revolution for refusal to grant him a passport, deprivation of personal liberty, and assaults and affronts by the local soldiery, and, as such, was obviously not cognizable by a municipal tribunal. The above-mentioned dictum was moreover given a wide application in subsequent cases. Thus in *Oetjen* v. *Central Leather Company*,[2] where certain hides were seized by General Villa, a successful leader of revolution in Mexico, for non-payment of a military contribution, and sold in that country to the predecessor in title of the defendant, the Supreme Court, in rejecting the claim of the assignee of the original owners, said:

"The principle that the conduct of one independent Government cannot be successfully questioned in the Courts of another is as applicable to a case involving the title to property brought within the custody of a court as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be examined and perhaps condemned by the courts of another would certainly imperil the amicable relations between Governments and vex the peace of nations."

And the same principle was applied in another case where the property seized belonged to an American citizen not resident in Mexico.[3] The principle laid down in these cases was held to apply in the *Luther* case, but widely as that principle is stated by the Supreme Court it must be remembered that it was being applied to executive acts of a foreign Government in time of civil war, and not to foreign legislation alleged to be immoral or contrary to the law of nations. Whether or not this would be a ground of distinction in America, I submit that under English law the respect due to the acts of foreign Governments within their territory does not in itself preclude our courts from declining to recognize rights acquired there under foreign legislation which is contrary

[1] 168 U.S. 250. [2] 246 U.S. 297. [3] *Ricaud* v. *American Metal Co.*, 246 U.S. 304.

to public policy or international law. The crucial question is this: Does the principle of respect for territorial sovereignty exclude the reservations subject to which foreign laws are alone applied? I see no reason why this should be so in the single case of title to property acquired under the foreign legislation, when it is admittedly not so as regards other rights similarly acquired.

The main interest of the *Jupiter* case for the present purpose consists in the decision that the confiscatory decrees do not operate extra-territorially. In most cases of conflict of laws this point is not in issue. Thus in cases of contract, formal validity depends upon the *lex loci contractus*; in cases of status, the law of the domicil, according to the English system, is applied. But although legislative competence is the underlying explanation of a great part of the rules, it is not in dispute in these and other classes of cases. The question of jurisdiction at international law arises in proceedings to enforce foreign judgments, and more rarely where, as in the *Jupiter* case, the rights claimed directly depend upon extra-territorial operation of a foreign law, which the other side disputes. When such questions arise they can, it is submitted, be decided only by reference to the law of nations. A great judge once said, in a famous case, that "the question what jurisdiction can be exercised by the courts of any country *according to its municipal law* cannot, I think, be conclusively determined by a reference to principles of international law",[1] but this dictum does not apply where the courts of one country are called upon to consider and give effect to the jurisdiction of those of another.[2] In such cases the law of nations must be the criterion, for it is obvious that the municipal law of the foreign country cannot provide the final test. There can be no obligation to enforce rights claimed under a foreign judgment which is *ultra vires* according to public international law. The same applies to foreign legislation.

In the *Jupiter* case, Hill J. gave no reasons for holding that the Soviet decree of confiscation had no extra-territorial effect, although he alluded to the general principle that the passing of chattels is governed by the law of the place where they are locally situate. He treated the point as self-evident, merely saying that "if the *Jupiter* was not within the territory of the R.S.F.S.R. I do not see how the mere passing of a decree could transfer the property". It is, however, clear, in my submission, that the decision

[1] Per Lord Herschell L.C. in *British South Africa Co.* v. *Companhia de Moçambique* [1893] A.C. 602, at p. 624.

[2] See *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670.

was based upon the nature of states and the limits of their jurisdiction according to public international law. The learned judge went on to say that he was "strengthened" in his opinion by the view taken by the Soviet authorities themselves as to the territorial effect of their nationalizing legislation, but this was not the ground of his decision, although certain observations in the judgments of Bankes and Lawrence LL. JJ. seem, perhaps, to suggest the contrary. Indeed, it is clear on principle that even if the Soviet legislation had provided expressly for extra-territorial operation this would have made no difference. The legislation, however framed, could not operate effectively outside the territory of the Russian State, and any provisions it might have contained for the transfer of property situate abroad would have been in excess of the jurisdiction recognized by the law of nations, and as such disentitled to respect in a foreign court. Sovereignty at international law imports jurisdiction over persons and property within the territory, and, to a limited extent, over the persons of nationals outside, but it has never been recognized as extending to property, as such, situate outside the territory, even if belonging to nationals.

As Story points out, the fact that the state has, by the law of nations, jurisdiction to make laws affecting its nationals abroad does not give those laws obligatory force beyond its own territory. They do not operate *proprio vigore* within the foreign territory, but can only be enforced by the enacting state on the return of the national to his own country. Any enforcement in the foreign country is *ex comitate*. The same authority adds that a state has just as much intrinsic right, and no more, to give to its own laws an extra-territorial force as to the property of its subjects situated abroad, as it has in relation to their persons.[1] This is true in a sense, but such laws would not, in any event, be entitled to international recognition on grounds of comity. The theory of real, personal, and mixed statutes lies far outside the limits of these pages, but it is apparent that a law purporting to transfer the title to movable property, while situate abroad, cannot, in any view, be regarded as one which other states are called upon to recognize. Usage affords no sanction to such legislation which, on the face of it, would constitute an encroachment upon the rights of the territorial sovereign. I submit, therefore, that it can fairly be said that such a law is contrary to public international law, as being in excess of the recognized limits of legislative competence.

[1] *Conflict of Laws*, 8th ed., p. 24.

THE WORK OF THE ELEVENTH ASSEMBLY RELATING TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

I

The Permanent Court of International Justice is rapidly acquiring a wide compulsory jurisdiction in international disputes. During the year 1930 the number of states bound by the Optional Clause rose from 17 to 34. The total now includes all the Members of the British Commonwealth of Nations, Germany, Brazil, Spain, the Netherlands, Sweden, and Yugo-Slavia. France has passed, through both her Chamber and her Senate, a law authorizing ratification. Ten other Governments, including those of Italy, Czechoslovakia, and Roumania, signed the Clause and are now known to have the question of ratification under active consideration. In addition to these adhesions to the Optional Clause, 44 bilateral treaties were concluded during 1930, which made provision for the judicial settlement of international disputes by the Court. Of these 44 treaties, 19 provided for the submission of all disputes of every kind either to an *ad hoc* arbitral tribunal or to the Permanent Court. In all, there are at the present time approximately 170 such bilateral treaties in force, almost all of which confer compulsory jurisdiction upon the Court.

There is now proceeding, therefore, a rapid extension of the compulsory jurisdiction of the Permanent Court. In consequence, the states which compose the international community of nations have, in continually increasing measure, a direct and vital interest in maintaining the efficiency, integrity, independence, and international loyalty of the Court. But if this is to be done, certain elementary but essential conditions must be fulfilled. Thus:

(i) Judges elected to the Court must be men who are prepared to make its service the first claim upon their time and effort;

(ii) Subject to the provisions of Article 9 of the Statute of the Court, under which it is provided that the whole body of the Court "should represent the main forms of civilization and the principal legal systems of the world", the judges who compose the Court should be chosen for their personal merits and personal qualifications and for them alone.

(iii) In consequence, political motives should be entirely excluded from the election of judges, and combination among the

electors, based upon political interest, should in no circumstances be contemplated or allowed.

No one who witnessed the first election of the judges to the Permanent Court by the Second Assembly in 1921 could doubt that these conditions had been at least reasonably fulfilled. But the proceedings of the Eleventh Assembly, which in 1930 conducted the second general election to the Court, raised certain doubts as to whether the conditions had been quite so well fulfilled. Indeed there were some observers of the events of 1930 who bluntly asked the question whether the general body of the Members of the League of Nations took to-day so non-political a view of the Permanent Court as they had taken when the Court was first established. On the whole, as this article will attempt to show, the answer that can be made to this question is satisfactory. But while that is said, it must also be admitted that the proceedings of the Eleventh Assembly gave at least a *prima facie* justification for the asking of the question.

For this reason, it is worth while to examine the proceedings of the Eleventh Assembly in so far as they related to the Permanent Court, and to consider the way in which the different issues raised were discussed and dealt with.

There were two principal items on the Assembly agenda which concerned the Court:

(i) The entry into force of the Protocol of September 14, 1929, on the Revision of the Statute of the Permanent Court, and of the Amendments to the Statute annexed to that Protocol.

(ii) The General Election of the Judges of whom, for the next nine years, the Court was to be composed.

II

It is necessary to start by recalling the origin and the purpose of the Protocol of September 14, 1929, on the Revision of the Statute of the Court.

The Protocol was prepared by a special Conference of the Parties to the original Statute—a Conference which was held simultaneously with the Assembly of 1929.

The purpose of the revision was threefold:

(1) "The revision was mainly intended *to remove a certain instability in the composition of the Court* in three different ways—namely, (i) by the abolition of the Deputy Judges, their place being taken by an equal number of Judges; (ii) by the adoption

of the principle of the permanent functioning of the Court; and (iii) as a consequence of the foregoing, by a stabilization of the salaries of the Judges." [1]

It was stated by those who proposed the revision that, as a matter of practice, the Judges sat regularly through the ordinary sessions held in the summer, while "the Deputy Judges almost constantly replace certain Judges, particularly Judges coming from overseas, during the extraordinary sessions convened in winter".[2] It was alleged by some that as a result the Court was not really "permanent"; that there was virtually a Summer and a Winter Court, and that litigants chose between the two that which they hoped would be most favourable to their cause.

(2) "*The Court has sometimes been prevented from sitting owing to inability to secure the necessary quorum.* The revised Statute avoided such a contingency by laying down that *Judges are bound to hold themselves permanently at the disposal of the Court.*" [3]

At its tenth session, the Assembly expressed the opinion that the work of the Court was certain to increase, and in a Report adopted by the Council in 1930, it was pointed out that "the Court's work has become so heavy that the Judges are bound to remain at The Hague for six to eight months every year".[4]

This consideration made the question of the quorum the more urgent and important.

(3) The Protocol of September 14, 1929, and the annexed amendments were drafted with the help of Mr. Root of the United States, and the United States Government had declared its intention to adhere, when the amendments came into force, to the Statute of the Court. One of the principal preoccupations of the United States authorities with regard to adherence arose out of the Court's procedure of Advisory Opinion; the amendments to the Statute in large part removed their doubts by assimilating the procedure of Advisory Opinion to that of Judgment. How much importance the Americans attached to the point is shown by a letter which the American Secretary of State, Mr. Stimson, addressed to President Hoover on November 18, 1930; in effect this letter urged that United States adherence to the Statute of the Court would be

[1] Report of the Committee appointed by the Council on September 9, 1930. *League of Nations Document* A. 45, 1930, V, p. 4. The Committee consisted of MM. Basdevant, Gaus and Pilotti. Cf. p. 114 *infra*.

[2] *Ibid.*

[3] *Ibid.* In his Report to the Tenth Assembly on the Amendments, M. Politis declared that the new provisions relating to the Judges were inspired by the principle that "their judicial functions must constitute their sole and exclusive occupation". A. 14, 1930, V, p. 3.

[4] *Ibid.*

justified as soon as the Amendments had come into force. It contained, among other significant passages, the following:

"*By these provisions* (i.e. the proposed amendments) *one of the chief dangers which has influenced American opinion in its objection to the rendering of advisory opinions by the Court has been removed.* America's fear lest the opinion of the Court could be sought by some nations and rendered by the Court in private, and that other nations might thus suddenly find their interests compromised by a decision of the Court on a question in which they are involved, no longer has any foundation. The Court in rendering advisory opinions must follow substantially the same procedure as is followed in controversies, or as they are termed in the Rules of the Court 'contentious cases'. It must act in public; it must give general notice of its proposed hearing, in order that any one who is interested may have an opportunity to be heard; and it must hear them. . . . This rule of conduct laid down by the Court itself (this follows a reference to the Eastern Carelia case) will now be made imperative and binding upon it by an amendment in the new proposed protocol of revision which is before us for signature. That protocol contains new Article 68 reading as follows: 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the Statute which apply to contentious cases to the extent to which it recognises them to be applicable.' . . . The Court, having already recognised this principle of contentious cases to be applicable, is required by this provision in its charter now forever hereafter to act accordingly. . . ."

It is plain from these extracts and from others that could be given that the question of the entry into force of the Protocol of September 14, 1929, involved the whole issue of the adherence of the United States to the Statute of the Court; and that if the Protocol of Revision were to fail, that adherence would be gravely compromised.

III

The Conference which prepared the amendments to the Statute in 1929 urgently desired that they should enter into force before the Assembly of 1930, in order that they could serve as the basis for the second General Election of the Court. According to the general rules of International Law the election could not be held on the basis of the Revised Statute unless all the parties to the original Statute had specifically agreed to the changes proposed, by ratifying the Protocol of September 14, 1929. It was, however, hardly to be expected that in the brief space of twelve months the whole of the forty-four parties to the original Statute of the Court would be able to ratify. In countries where the Constitution makes necessary the consent of the Legislature for the ratification of any treaty, it is plain that Parliamentary delays may render ratification before a fixed date a practical impossi-

bility. With this fact in mind, the Conference inserted into the Protocol of September 14, 1929, the following clause (Article 4):

"The present Protocol shall enter into force on September 1st, 1930, provided that the Council of the League of Nations has satisfied itself that those Members of the League and States mentioned in the Annex to the Covenant, which have ratified the Protocol of September 16th, 1920, and whose ratification of the present Protocol has not been received by that date, have no objection to the coming into force of the amendments to the Statute of the Court which are annexed to the present Protocol." [1]

The arrangement thus proposed was undoubtedly anomalous. At the Assembly of 1930, after it had failed, there were some people who rejoiced in its failure. They said that the Protocol and the amendments could only "come into force" in any true sense of the words, when they had been ratified by all the parties to the original Statute; that this Article 4, therefore, was no more than a mere declaration of good will, which, until ratified, could not bring legally into force the changes which had been agreed to. They argued, accordingly, that if the plan of Article 4 had succeeded, the new Court would have been elected in 1930 on the basis of an instrument not legally in force, and that in consequence the juridical foundations of its authority would have been gravely prejudiced. But at the Conference and the Assembly of 1929 this argument was never advanced; no voice was raised against the plan suggested; Article 4 of the Protocol, like the rest of the work of the Conference, was unanimously agreed to; and thus it was at that time the declared purpose and intention of all the revising Powers that the elections of 1930 should be held on the basis of the amended Statute.

In fact, as has been said above, this declared purpose was defeated. A great many ratifications were received before the Assembly of 1930 opened; in the first fortnight of September a dozen came in. And of those parties who had not found it possible to ratify, the great majority, including all the influential Powers concerned, informed the Council that their views and wishes were unchanged, and that they had "no objection to the coming into force of the amendments".

But one Power objected—the Republic of Cuba. The alleged reasons for its objection were stated in a letter to the President of the Council which carried singularly little conviction to any other Member of the League, and in fact it was universally believed that

[1] Article 4 of the Protocol of September 14, 1929; *League of Nations Document* A. 45, 1930, V, p. 1.

there were other unavowed reasons which had dictated the Cuban Government's action.

It is evident that any one Power which made "objection", and thus thwarted the will of all the other parties to the revision agreement, would thereby assume a responsibility of the gravest kind. But that objection would be made on grounds such as those which the Cuban letter put forward or those which rumour attributed to the Cuban Government was something which no one had conceived as possible. The Cuban action was, therefore, widely resented in the Assembly, and there was widespread sympathy and agreement with M. Politis, the delegate of Greece, when he denounced it in the First Committee in a speech of great courage and great eloquence. The case he made was never answered in the debates of the First Committee; the motives for the Cuban objection were never adequately explained; and there can be little doubt that it was due in great measure to his outspoken language that the Cuban delegate announced a little later that if all the other parties ratified the amendments to the Statute he felt confident that his Government would do the same.

This declaration held out the hope that in the long run the Cuban Government would cede to the pressure of general opinion and would ratify the amendments. This was a fact of great importance; but it did not help the Eleventh Assembly to solve the practical questions by which it was faced. For the immediate situation was this: the Cuban objection had been lodged; the plan envisaged in Article 4 of the Protocol had thereby been defeated; in consequence, the election to the Court must be held on the basis of the original unrevised Statute. And this fact left the Assembly face to face with three important problems.

First, must the election be held on terms exactly similar to those of 1921? In other words, was the purpose of the amendments to the Statute wholly defeated? Or could some other plan be made, by which, within the framework of the original unamended Statute, that purpose could be in whole or in part fulfilled?

Second, if such other plan were found (as in fact it was), would it still be desirable that the amendments should enter into force after the election had been made?

Third, if the amendments did enter into force after the election had been made, what would be the juridical effects of that event? How, if at all, would it affect the position of the judges? Having been elected on the basis of the original Statute, would their rights

and duties be governed for their term of office by that original Statute, or would they, on the contrary, be governed by the amended Statute as soon as the amendments entered into force? If there were any doubt about these points (and there was such doubt), was the Assembly competent to express an opinion about the right solution? And if it were competent, what opinion should it express?

These were the three practical problems which the Assembly had to face and solve. It will be convenient to consider them in turn.

IV

Article 4 of the Protocol of September 14, 1929, laid upon the Council of the League the duty of "satisfying itself" that parties to the Statute of the Court which had not ratified the amendments before September 1, 1930 had nevertheless no objection to their coming into force. It was, therefore, the Council which had first to consider the situation created by the Cuban objection.

The Council might perhaps have fulfilled its duty under Article 4 by simply reporting to the Assembly that objection had been made, and that, therefore, the election of the Court could not be held on the basis of the amended Statute. But it was in accordance with the traditions of the Council that it should not simply take this formal action and do nothing more. In 1920 it had played a great part in the preparation of the original Statute which the Assembly of 1920 adopted. And in 1930 it felt once more called upon to give a lead to the Assembly in the difficult situation which had arisen. Accordingly, on September 9, 1930, it appointed a committee of legal experts, whom it instructed "to take the necessary steps to enable it to submit definite proposals to the Assembly in regard to the situation". The committee consisted of M. Basdevant, M. Gaus, and M. Pilotti, the legal advisers of the French, German, and Italian Delegations. It heard in evidence M. Hammarskjöld, the Registrar of the Court, and then drew up a report, which was received and adopted by the Council on September 12, and thereafter submitted by the Council to the Assembly.

The Report contained definite proposals for alternative methods of carrying out the purpose of some, at least, of the amendments. Thus, it appeared that the instability of the composition of the Court and the difficulty of obtaining a quorum could both in some measure be dealt with, and the principle of

the permanent functioning of the Court could be definitely established, within the framework of the original unamended Statute. The proposals of the Committee are explained in the following passages from their report:

1. "By abolishing the Deputy Judges and raising the number of Judges from eleven to fifteen (the number of Judges required to constitute the full Court remaining at eleven), the revised Statute arranged for a constant composition of the Court except in the case of leave or unavoidable absence.

"The same result might, it seems, be obtained by applying Article 3 of the Statute of 1920 so as to increase the number of Judges from eleven to fifteen." [This required an Assembly Resolution to be adopted on the proposal of the Council, and a draft of this Resolution was submitted by the Committee.] "Article 25 of the 1920 Statute provides that the full Court is validly constituted if eleven Judges are present. There is reason to hold that the proposed increase would not affect this rule. Thus the practical effect of the increase would be to make it unnecessary, save in entirely exceptional cases, to have recourse to the Deputy Judges, who are not affected by the disabilities under which Article 16 of the Statute places the Judges." [1]

2. "As a remedy for the serious disadvantages inevitably arising from the presence on the Bench of so large a number of Judges (15), the revised Statute (Article 25) laid down that the Rules of Court might provide for allowing one or more Judges, according to circumstances and in rotation, to be dispensed from sitting. A similar solution might be adopted under the terms of the present Statute. It would be desirable to call the attention of the Court to the possibilities in regard to determining the conditions and duration of the leave to be accorded to its members which are offered by the power to regulate its procedure conferred on it by Article 30 of the 1920 Statute."

3. "As regards the permanent functioning of the Court, the Committee considered that Article 23 of the 1920 Statute, according to which, unless otherwise provided by Rules of Court, the annual session begins on June 15, is capable of giving the Court itself a means of largely achieving the object of Article 23 of the revised Statute, which laid down that the Court shall remain permanently in session except during the judicial vacations.

"Article 23 of the 1920 Statute in no way prevents the Court from itself adopting by the enactment of appropriate rules, the system of permanent sessions. The Assembly and the Council might express a desire that the Court would incorporate this solution in its Rules of Court. In any case it would be perfectly permissible for the Court to bring the opening of its annual session into relation with the system of annual leave for the Judges so as to make the functioning of the Court possible during the whole period necessitated by the amount of work to be performed."

The Committee considered that these proposals would largely meet the difficulties that had been experienced concerning the "instability in the composition of the Court". With regard to the difficulty of constituting a quorum, they said that "The increase

[1] *League of Nations Document* A. 45, 1930, V, p. 4.

in the number of Judges would avoid this drawback so far as is possible under the 1920 Statute".[1]

The changes proposed evidently carried with them, as a further consequential change, the increase and stabilization of the salaries and pensions of the Judges, which had hitherto been fixed on the basis of the non-permanent functioning of the Court, and had, therefore, varied in accordance with the number of days on which the Court had actually sat. This consequential change could again be made by Assembly Resolutions, and again the Committee made a draft.

The Committee's Report and Resolutions were designed to carry out the purpose of the amendments as far as it was possible to do so within the framework of the original unamended Statute. Their plan was adopted as it stood by the Council, and recommended by the Council to the Assembly. The Assembly likewise adopted it, and duly passed, with slight amendment, the Resolutions which the Committee had drafted. But the Assembly showed a more active desire than the Council to dot the "i"s and cross the "t"s. It was definitely increasing the number of the Judges and voting an increase in their remuneration, on the theory that the principle of the permanent functioning of the Court would be adopted by means of the changes in the Rules of Court which the Committee had proposed. Therefore, without hampering the liberty of the Court to take the decisions which it might consider right, the Assembly desired to make quite plain what were its own feelings with regard to these changes in the Rules of Court and particularly with regard to the permanent sessions and Judges' leave. It therefore added to the Resolutions which the Committee and the Council had suggested another of its own. It was in the following terms:

"*Resolution* 3. The Assembly requests the Permanent Court of International Justice to examine the suggestions contained in Part II, paragraphs 1 and 2, of the report of the committee which was submitted to and approved by the Council of the League on September 12, 1930, and expresses the hope that the Court will give consideration to the possibility of regulating, pending the coming into force of the Protocol of September 14, 1929, concerning the revision of the Statute of the Court, the questions of the sessions of the Court and the attendance of the Judges on the basis of Article 20 of the Statute as annexed to the Protocol of December 16, 1920." [2]

It is not without significance that when this Resolution was first put forward in the First Committee, the delegate of Cuba

[1] *Ibid.*

[2] *League of Nations Document* A. 57, 1930, V, p. 1.

complained that the whole substance of the amendments was being reintroduced by indirect means. And, indeed, under a form which in no way hampered the free judgment of the Court, this Resolution went as near to a definite recommendation to the Court as the Assembly could reasonably do. It has, moreover, in the event been accepted as such by the Court, who have revised their Rules of Court precisely in the sense which the Assembly hoped for.[1] Thus, as a result of the Council's and the Assembly's deliberations, the number of the Judges has been increased, Deputy Judges (since in practice they will never sit) have been virtually abolished, and the system of continuous sessions has been introduced.

It cannot be pretended that the purpose of the amendments was as satisfactorily attained by these changes as it would have been by the entry into force of the amendments themselves. There is nothing so categorical as the provisions of the new amended Articles 16 and 23;[2] nothing which so plainly applies the principle that the "judicial functions" of the Judges "must constitute their sole and exclusive occupation".[3]

Yet in a considerable measure the effect of the Cuban veto was nullified, and in respect of a great part of their object, the purpose of the amendments to the Statute was achieved.

V

We pass to the second problem which the Assembly had to face. An alternative plan for carrying out, in part at least, the purpose of the amendments had been prepared, and it was on the basis of this plan that the election of 1930 must be held. This being so, was it still desirable that the amendments should enter into force after the election of the Court had been made? If so, was it desirable also that the Assembly should do anything to secure their entry into force?

There was a certain moment in the discussions of the First Committee when it appeared likely that the Assembly would

[1] By a decision of the Court taken on February 21st, 1931. *Vide Publications of the Court*, Series D., No. 1, 2nd Edition.

[2] The new Article 16 provided: "The members of the Court may not exercise any political or administrative function, *nor engage in any other occupation of a professional nature.*"

The new Article 23 provided: "Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, *to hold themselves permanently at the disposal of the Court.*"

[3] Cf. *supra*, p. 109.

adopt the Council Committee's three draft Resolutions and would do nothing more. There was at first a disposition to consider that, since the amendments had failed as a basis for the election of 1930, they had failed for good and all. The President of the First Committee, Signor Scialoja, made a speech which virtually argued that they were dead; and he implied that it was no business of the Assembly to endeavour to resuscitate them. At the best, it must pass them over in silence and let them take their chance.

The clarity and precision with which Signor Scialoja stated this point of view brought a strong reaction against the pessimistic conclusions which he reached. No one was ready to accept the proposition, on which his argument was based, that the Assembly had no right to consider the eventuality of the amendments coming into force. But for some time the issue was obscured by doubts as to what would be the legal effect of the amendments if and when this eventuality occurred. The confusion to which these doubts gave rise is discussed in Section VI below. It was only when this confusion had been cleared away, and when a long debate had brought substantial agreement as to what the right solution of the doubts should be, that the Committee was able to adopt a Resolution declaring that it *was* desirable that the amendments should enter into force, and urging states which had not yet done so to ratify the Protocol of September 14, 1929 "as soon as possible".[1]

The reasons which moved the First Committee to adopt this Resolution were, briefly summarized, as follows:

1. The desired reorganization of the Court was only imperfectly effected by the other Assembly Resolutions described above. It would be more completely and satisfactorily carried out when the amendments, and in particular when the revised Articles 16 and 23 of the Statute,[2] had come into force.

2. The legal basis of the reorganization would be more satisfactory when the desired changes had become part of the constituent Statute of the Court.

3. At the time when the Resolution was adopted, the Assembly could have no absolute assurance that the Court would think it possible and right itself to make the suggested changes in its Rules of Court. And yet it was on these changes that the whole of the Council Committee's alternative plan depended.

4. The Council Committee's plan made partial provision for carrying out the reorganization of the Court, but it wholly neg-

[1] *League of Nations Document* A. 57, 1930, V.

[2] Cf. p. 116, note 2.

lected the other purpose for which the amendments to the Statute were drawn up, namely, the modification of the articles relating to the procedure of Advisory Opinion. For this, perforce, it made no provision at all. Until the amendments came into force, therefore, the new rules concerning advisory opinions would not operate; and until they did operate, the adhesion of the United States to the Statute of the Court could not be hoped for.[1]

5. Lastly, there was another reason, not much expressed except by implication in the debates of the First Committee, yet none the less powerful in the minds of nearly all its members. The majority of the Assembly were unquestionably reluctant to allow the work of the revising Conference of 1929 to be brought to naught by the opposition of a single state like Cuba, impelled by reasons which carried so little conviction as those which the Cuban Government and delegation had advanced. They felt that if such opposition were to succeed in a matter of such gravity as this, a precedent would be created which might imperil the whole future of international organization and legislation by means of General Convention.

For these reasons the Assembly decided to throw the whole weight of its influence into persuading the Parties to the Statute of the Court, including Cuba herself, to ratify the amendments with the least possible delay.

VI

There remains the third problem which the Assembly had to face. If the Assembly Resolution on the subject were successful, and all the Parties to the Statute ratified the amendments without delay, what would be the juridical effects of that event? How would it affect the position of the Judges? Having been elected on the basis of the original Statute, would their rights and duties be governed for their term of office by that original Statute, or would they, on the contrary, be governed by the amended Statute, as soon as the amendments entered into force? Was the Assembly competent to express an opinion on these points, and, if so, what opinion should it express?

The discussion on these points was, in its early stages, exceedingly confused. There were certain sections of opinion which inclined to an extreme, and, as the present writer thinks, a fantastic view of the consequences which would follow from the entry into force of the amendments subsequent to the election of

[1] Cf. *supra*, pp. 109–10.

the Court. They argued that the Protocol of December 1920, which brought the original Statute of the Court into force, was a contract between sovereign states. It was in virtue of that contract that the Court would be elected by the Eleventh Assembly. The Protocol of September 14, 1929, which would bring the amended Statute into force, was a second and a wholly separate international contract between sovereign states. When this second contract came into force, the first would simultaneously and automatically cease to have any force or validity of any kind. This being so, the Court which was elected in virtue of its terms would cease to have any legal existence or legal rights. It would come to an end with the international contract on the strength of which it had been created. Its Judges would become simple citizens again, without international rights or duties of any kind. Therefore, when the amended Statute came into force, there would have to be a new election of all the Judges on the basis of this new and separate international contract. Unless such a new election took place, there would, after the entry into force of the amended Statute, be no Court with any valid authority or power.

There were other sections of opinion less extreme than this, but consisting of people who were genuinely disturbed by the possible legal complications that might follow from the entry into force of the amendments after the election had been made. The Judges, they argued, will be elected to their posts on certain terms and understandings; after they have taken office, these terms and understandings will be changed. Can it be held that this change will be right and equitable? May it not happen that certain Judges will be elected on the old terms who would never have agreed to be candidates on the new? If so, what will be their position? Will their original contract with the Assembly hold good, or must they accept the new conditions which the amended Statute will impose?

The answer to all these difficulties appeared in the course of the debate. By the end of the discussion the doctrine of the extremists disappeared. Every one was agreed that the Statute of the Court was not a temporary contract which was brought completely to an end by any agreement to vary even the most insignificant of its terms. On the contrary, it was a continuing, living instrument, part, if the phrase may be allowed, of the general constitution of the League. It was an instrument the purpose of which was to create a judicial institution with a permanent existence, an institution which, when it was created, no one had for

one moment suggested should or could ever be brought to an end. It was an instrument in itself without any time-limit, or any provision for denunciation; an instrument, therefore, which, in accordance with the nature of all human organizations, must be liable to amendment or to change as and when changes in the social needs of the community might require. Thus it was agreed that the amendments annexed to the Protocol of September 14, 1929, were not a new and separate international contract, but, on the contrary, were additions to the original Statute, destined to become part of that original Statute when the Protocol should enter into force. They were thus, in legal character, just like the numerous amendments to the Covenant which have been made, or indeed like any amendments to any constitutional instrument which is in force.

Once this point was clearly established, the other minor difficulties which had been raised resolved themselves. If the authority of the Court rested after, as before, the entry into force of the amendments, on the basis of a single continuing Statute, if the Judges held their positions and exercised their rights and duties by virtue of a single continuing instrument, then it was plain that no doubt or ambiguity could arise. They were elected on the basis of that instrument as it had been adopted in 1920, but with the clear understanding that, like all constitutional instruments, it might be changed. If and when it was changed, their position would still be governed by the same instrument, but in its amended form. If they disliked the changes that were made, they were free to resign their office; but unless they did resign, they must accept the changes whatever they might be.

This doctrinal position was absolutely clear and quite straightforward. Its acceptance was particularly easy in the special circumstances of the 1930 Assembly, for the following reasons:

i. The Council Committee's plan effected such changes in the position of the Judges that the further changes to be effected by the entry into force of the amendments would be relatively small.

ii. The amendments were already in final form and known to all the world. The prospective Judges, therefore, had full knowledge of the changes which they must expect.

iii. The Resolution of the Assembly, urging early ratification of the Protocol of September 14, 1929, gave the prospective Judges full warning that the sovereign authority of the Members of the League would be exercised in an endeavour to bring these changes into effect at the earliest possible moment.

There was no possible case for holding, therefore, in the actual circumstances of the 1930 Assembly, that Judges might be elected on certain terms and understandings, and might thereafter be inequitably compelled to accept different terms. On the contrary, the whole position was as clear as day to every candidate for the Court, and no question of misunderstanding or inequity could possibly arise. When they were elected, the new Judges would clearly understand that, in all human probability, they would after a short interval of time be governed by the amended Statute; while the new Deputy Judges would know that they would never exercise their functions and, indeed, would shortly be abolished.

There were certain delegates in the First Committee who desired to put the whole matter beyond all doubt by a further Assembly Resolution. This Resolution, they urged, should categorically declare that while the election of 1930 would be conducted in accordance with the existing Statute, "the position of the Judges and Deputy Judges so elected would, as from the coming into force of the Protocol amending the Statute, be governed by the provisions of the Statute as thus amended".

In the end, however, it was decided that no such Resolution was required. The arrangements adopted by the other Resolutions, together with the discussions in the First Committee, had for all practical purposes removed whatever doubts had previously existed. The terms of Resolution No. 3 indeed were explicit; the Assembly thereby expressed the hope that the Court would "give consideration to the possibility of regulating, *pending the coming into force of the Protocol of September 14, 1929*, the questions of the sessions of the Court and the attendance of the Judges".[1] The insertion of the italicized words clearly assumed the conclusion stated above.

There was a further point upon which substantial agreement was also reached, although that agreement did not appear in the text of the Resolutions formally adopted. It was this: that it was not really the function of the Assembly to express an opinion on such a question as this. It was agreed that the Assembly was clearly entitled to assume that a certain opinion was correct, and to proceed to make elections on that assumption. But if doubt about the validity of that opinion really existed, it was not the Assembly, on such an exclusively legal issue, that could resolve it. That, in the last resort, must be the function of the Court itself. Therefore, while the opinion of the Assembly in fact was clear,

[1] For the text of the whole Resolution *vide supra*, p. 115.

while the conclusion above described was implied and assumed in all the Resolutions which it adopted, those Resolutions did not include the formal declaration which had been proposed.[1]

VII

It is now necessary to consider the election of the Court which the Eleventh Assembly carried through. And here a change of note will be observed by the attentive reader. In all its proceedings concerning the amendments to the Statute, the discussions and decisions of the Assembly were worthy of the traditions which it had established when it drew up the Statute in 1920. In every case, as the previous sections of this article have shown, the right conclusion was adopted, and the forces of inertia or reaction were circumvented or defeated. With regard to the election, however, it is not possible to continue the same satisfactory record or to discuss what happened in the same complacent strain.

The election was held on September 25, 1930. It was conducted in accordance with the highly complicated system laid down in Articles 2–12 of the Statute. Under this system, candidates are nominated by the National Groups of arbitrators in the Court of Arbitration (established by the Hague Convention of 1899); each National Group may nominate four persons, of whom two only shall belong to its own nationality; before making its nominations, it is "recommended to consult its highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and sections of international academies devoted to the study of Law".[2] The Court is elected by the Assembly and the Council, sitting simultaneously and separately; it is laid down in express terms that they are to "proceed independently of one another to elect, firstly the Judges, then the Deputy-Judges".[3] Those candidates who obtain "an absolute majority of votes in the Assembly and the Council shall be considered as elected".[4] In case the Assembly and the Council cannot both secure an absolute majority of votes for the same candidates, an elaborate alternative procedure for breaking the deadlock is provided.

It is evident that this method of election is extremely complex,

[1] The only practical case in which it was at all likely that the issue could arise in future was that of the "incompatibilities", i.e. as a result of the stricter prohibition laid upon Judges in respect of other functions which the revised Article 23 laid down. If such a case were to arise after the amendments came into force, it was universally agreed that it was the Court which must decide (cf. *supra*, p. 116).

[2] Article 6 of the Statute. [3] Article 8. [4] Article 9.

and it might be expected that it would be difficult to work. The purpose which dictated in 1920 the adoption of its different provisions will be considered in Sections VIII and IX, and it will be there discussed how far that purpose has in practice been fulfilled. But it is necessary, before that discussion is begun, to describe how the system actually worked at the Assembly of 1930.

Under the provisions relating to nomination, the National Groups nominated 58 different candidates. Of these probably less than 25 received serious consideration by the electing delegations, and less than 20 received enough votes even on the first ballot to give them any hope whatever that they would ultimately be elected. It is plain, therefore, that on this occasion the nomination of the greater part of the candidates put forward was in reality an empty form.

Before the election of 1921 it was predicted by experts that the preliminary ballots would show very little agreement among the delegations; that a great number of ballots would be required before the Assembly and Council could agree; and that the election might easily last for days. It is evident, indeed, that the process of securing an absolute majority of votes in two bodies of different composition acting separately and "independently" of each other must be difficult and may be long; and the difficulty was not diminished by the increase of the places to be filled from 11 to 15. Yet in the election of 1930 the very first ballot which occurred gave an absolute majority in both the Assembly and the Council for 14 out of the 15 places to be filled. And for the fifteenth place, one candidate obtained an absolute majority in the Council, and was only one short of the absolute majority (27) required in the Assembly to secure his definite election.

Such an astonishing result could only be explained on the hypothesis of an extraordinarily complete and successful canvass. It was in fact known that such a canvass had taken place; but the result of the election made it plain that the canvass could hardly have proceeded merely by the recommendation of the claims of different candidates, but that it must have included also definite electoral arrangements between the different groups of Powers—arrangements based presumably on the principle of "*do ut des*". The case in favour of this presumption was strengthened by the fact that the Court elected was by no means the strongest that could be found. It was particularly noticeable that among the candidates put forward as the representatives of one of the "main forms of civilisation and principal legal systems of the world",

none of the three regarded by delegations from other continents as possessing the most eminent personal qualifications was in fact elected. Thus it is plain that the system of election did not function in 1930 altogether as it was intended by its authors that it should.

This impression was confirmed by the further ballots for the fifteenth place among the Judges, and for the four Deputy-Judges. For the fifteenth Judge, there ensued a protracted struggle, in which the Council for some time gave a majority to one candidate, while the Assembly either gave a majority to another or failed to give a majority to any one at all. It was finally settled after a desperate bout of canvassing on the floor of the Assembly itself, with a result that many serious observers deplored. For the Deputy-Judges, there was nothing but empty honorific titles at stake; no one really cared what was the result; yet the difficulty of getting a common list accepted both by the Assembly and the Council necessitated a series of ballots that continued until late in the evening, and ended in the exhaustion and exasperation of all concerned.

It was evident even to a superficial observer that this election of 1930 was not at all the kind of operation which the authors of the Statute had hoped in 1920 that it would be. It was indeed quite definitely less satisfactory than the election of 1921. No doubt the blame, if blame there be, rests ultimately with the Assembly delegations, with the national governments by whom those delegations are instructed, with the national publics by whom those governments should be controlled. Yet there are certain parts of the machinery of election which worked so differently from what had been intended and expected that it is difficult to avoid the question whether changes in those parts of the machinery might not serve to change the nature of the election as a whole.

This question is raised most obviously by the two essential steps in the process of election: the procedure of nomination and the procedure of simultaneous, separate, and "independent" election by the Assembly and the Council. These two steps may be discussed in turn.

VIII

The procedure of nomination of candidates through the agency of the National Groups in the Court of Arbitration, after those Groups have consulted with their respective High Courts, learned

bodies, &c. has been described above. The reasons for its adoption were summarized by the Committee of Jurists who prepared the first draft of the Statute in the following passage in their Report:

"It will fall to the body of arbitrators appointed to the Permanent Court of Arbitration of The Hague by the states, and not to the states themselves, to select the men, who in their opinion, are best qualified to be summoned by the League of Nations to sit upon the Permanent Court of International Justice. In this way the Governments will not be entirely excluded as they will have appointed the members of the Court of Arbitration taking part in the nominations on their behalf, but on the other hand, it will be to these arbitrators, men of proved ability in international affairs and chosen by the Governments, that the task will be left of selecting those candidates in whose moral and scientific qualifications for the Bench they have most confidence." [1]

The system, as indicated in this passage and proved in other passages of the Report, was the result of a compromise between two different motives. The first was to give to the Governments themselves a connexion with the nomination of candidates "sufficiently close . . . to ensure that states would . . . have confidence in their Judges".[2] The second was a desire to safeguard the appointment of Judges "from any influence of Governments", and a "fear of political combinations and intrigues based on the principle of *do ut des*".[3] Of these two, the second was in this matter of nomination definitely predominant over the first. As M. Bourgeois said in his Report to the Council on the Draft Statute: "The essential object of the Hague Jurists has been to free the nomination of the Judges from the political interests of the different countries."[4] And M. Bourgeois definitely accepted the view of the Jurists' Committee as set forth in the passage quoted above, viz: that the nomination would fall to the "arbitrators, men of proved ability in international affairs", and "not to the states themselves". This plan was sound, he declared, because: "The special competence of members of the Court of Arbitration . . . makes possible a solution genuinely in conformity with the essential idea of this lofty jurisdiction."

It would be unjust, and indeed definitely untrue, to say that this system of nomination had wholly failed to achieve the "essential object" of which M. Bourgeois spoke. On the whole, the candidates put forward have been the kind of men for whom "the Hague Jurists" and the First Assembly hoped. And no doubt the system has been in part responsible for that result.

[1] *Report of the Advisory Committee of Jurists*, July 23, 1920, p. 16. [2] *Ibid.*, p. 13.
[3] *Ibid.* [4] *Assembly Document* 44, 1920 (20/48/44), p. 90.

And yet the system hardly worked in 1930 as it was intended that it should. It failed in two respects.

First, it was in fact the Governments, and *not* the National Groups of Arbitrators, who in many cases decided the nominations that were made. The actual nomination by the Groups was no more than an empty form.

Secondly, the delegations at the Assembly in many cases made it plain that among their nationals who were candidates there was only one whom they themselves would agree to support, and that the nomination of the others had been again an empty form. This in effect restricted very greatly the field of candidates from among whom other delegations were free to choose.

The first of these failures made it difficult not to wonder whether in certain cases "the nomination of the judges" had in reality been "freed from the political interests of the different countries".

The second of these failures may perhaps in some measure be inevitable. It is plain that each national delegation will prefer one among its candidates, and that other delegations will desire so far as possible to meet its views. But this year's proceedings suggested the question whether such delegation selections were not too summarily made and too rigidly adhered to, and whether some better method of co-ordinating the general views should not be sought.

Both results were unfortunate from the point of view of the selection of the strongest possible Court. They inevitably raise the question whether some change could not be effected in the method of nomination, by which the intentions of the authors of the Statute could be more adequately and more certainly fulfilled.

IX

The case for the reconsideration of the method of simultaneous, separate, and "independent" election by the Assembly and the Council is even stronger. The events of 1930 proved that this method is so complex that it puts a premium on canvassing of an undesirable kind; it deprives the Assembly of the help of its natural leaders, the heads of its most important delegations, just when that help is most required; and it was quite certainly to blame for the result described above in respect of the fifteenth place among the judges. There is thus at least a *prima facie* case against this

double system and in favour of direct election by the Assembly acting alone. Since this is so, it is perhaps worth while to examine what was the origin of this double system, what were the reasons which led to its adoption in 1920, and whether those reasons still hold good.

The origin of the system is explained in the following passage from the report of the Advisory Committee of Jurists who drew up the Draft Statute of the Court in 1920:

"In order to perform the duties required of it, a really permanent court must be composed of a small number of judges; on the other hand, in order to be a really international tribunal, it must be open to all the states in the world. If it is to be accepted by all the states in the world, it must inspire their confidence by offering them judges whom they have helped to select. In 1907 the plan afforded the Great Powers a permanent judge upon the court, whereas the other Powers were to be represented in rotation: this provision caused the failure of the scheme; it was rejected, at the urgent instance of Brazil, by all states which were not Great Powers, as being contrary to the principle of equality of states.

"Is the equality of states really at issue when determining who is to have a share in the composition of an international Jurisdiction? Does not the equality of states simply mean that no state may interfere in the internal affairs of another, thereby infringing its sovereign rights? Granted that all states are sovereign states, are they not made equal by this very fact, no matter what the extent of their influence may actually be, from a political point of view, upon the common interests of mankind? It may well be that this standpoint, which was taken up by one member of the committee, is legally strictly correct; however, from a psychological point of view, in the public opinion of various countries, the fact that a certain number of states claimed a permanent judge on the ground of their position as being Great Powers, would be opposed to the principle of equality.

"It therefore became necessary to find a system which would almost certainly ensure that the Great Powers would be represented by judges, with the free consent of the other Powers, as their great civilising influence and juridical progress entitle them to be, even though no weight were attached to the fact that it would be greatly to the interest of the Court to include them on the bench, to increase respect for its sentences, which could not be put into execution without the all-important support of their military, economic, and financial powers. The system of election of the judges was the only practical one. Before the organisation of the League of Nations the electoral body would have been the whole body of the nations, and the great states would have been on the same footing as the others. The formation of the League of Nations, with two political bodies—the Council, in which the special representation of the Great Powers was assured, and the Assembly—enabled the Great Powers to obtain protection from the dangers of a possible coalition vote against them in the Assembly. Both the Assembly and the Council on an equal footing must elect the judges, so as to secure that no person can be appointed to the Court who does not possess the confidence of both the Assembly and the Council.

"Hence there is no danger of a coalition either on the part of the great states against the others, or of the other states against the great. There is therefore no

cause for anxiety, and no possibility of a surprise occurring which might inflict upon a Great Power the humiliation of finding itself, contrary to its anticipations, alone or almost alone amongst the other Great Powers, without a judge of its nationality.

"In addition, the principle of equality of states, as contained in the Covenant, is respected." [1]

A little farther on in the Report a rationalized philosophic defence is given for the double system of election thus devised. This defence is as follows:

"The principle governing the solution of the problem is brought out by the above: the new Court, being the judicial organ of the League of Nations, can only be created within this League. As it is to be a component part of the League it must originate from an organisation within the League and not from a body outside it.

"Where is such an organisation to be found? At this point a comparison between national jurisdictions and international jurisdictions gave the due solution to the problem. In nearly every civilised country in the world judges are appointed by the Executive or by the Legislature or by both together. The judicial power, though representing that aspect of sovereignty which is symbolised by the sword and lance, and though constituted as an independent power, nevertheless is derived from one or other of these bodies unless it is directly elected by those under its jurisdiction. Appointments to it are made, sometimes by the Legislature, in some cases by the Executive, sometimes by the Executive with the consent of the Legislature, or sometimes by the Legislature on the proposal of the Executive; however this may be, a judge being a member of the judicial organisation of the state, derives his powers from the sovereignty of the state as a whole. In whom is the ultimate authority in the League of Nations vested? Obviously in the Members of the League.

"It must therefore fall to the Members of the League of Nations, who alone are subject to the jurisdiction of this high Court, to appoint the judges in normal circumstances; and this not indirectly through their representatives on the Court of Arbitration, but by direct selection made at the time and in possession of all relevant information. Since there are two bodies in the League of Nations, the Assembly and the Council, in the former of which all nations within the League are represented, and in the latter certain nations only by a special privilege, which is permanent in the case of the Great Powers and occasional and temporary in the case of others, the duty of carrying out the elections must fall to these two bodies simultaneously." [2]

A careful reading of this second passage permits the conclusion that this defence of the double system is special pleading in favour of a scheme which had been adopted for quite a different reason. That reason is clearly stated in the first passage quoted above. It was the necessity for finding some solution for the problem created by the Great Powers' demand that they should have permanent

[1] *Report of the Advisory Committee of Jurists*, July 23, 1920, pp. 9–11.
[2] *Ibid.*, pp. 14–15.

judges of their own nationalities in the Court.[1] The scheme adopted might be held to respect, as The Hague jurists claimed that it did respect, "the principle of equality of states, as contained in the Covenant". But this was only possible because in fact it guaranteed to the Great Powers the same permanent representation in the Court that the Covenant gave them in the Council. And the scheme virtually guaranteed the Great Powers such permanent representation in the Court for the simple reason that in 1920 they had a majority of the seats in the Council. The system proposed thus gave them an absolute assurance that their candidates would be elected, since without their consent in the Council, which they controlled, no election to the Court could be completed.

Now in 1920 it may well have seemed to the Great Powers that an assurance of this kind was essential. The Great Powers had responsibilities throughout the world which lesser Powers had not. They were still strongly under the impression of the experience of 1907 described in the passage from the Jurists' Report which is cited on p. 127. They were aware that the smaller Powers still resented the privileged position which in the nineteenth century the "Concert" had acquired, and the arbitrary jurisdiction which on occasion it had wielded. They were still afraid that the smaller Powers might make a "coalition" against them in the Assembly. They therefore still demanded, as a condition of their consent to the creation of the Court, a guarantee that among its members there would be Judges chosen from among their nationals. It was to meet this demand, to solve the problem which had proved insoluble in 1907, that the Jurists' system of double election had been devised; and it is beyond all doubt that without the guarantees which that system provided for the Great Powers, the First Assembly could not have set up the Court.

But since 1920 the situation has changed in all respects. There is no longer the resentment that then existed against the privileged position of the Great Powers. There is no longer any fear among the smaller Powers that the Great Powers will combine against them. Indeed, so far from fearing such a combination, the smaller states have in great and increasing measure accepted the Great Powers as the natural leaders of the Assembly. So true has that become, so remote is the thought of any coalition of the smaller states against the Great Powers, that no one even suggests as a possibility that the Great Power candidates should not be elected

[1] Cf. also M. Bourgeois' Report to the Council, August 3, 1920; *Assembly Document* 44, 1920, pp. 69–71.

to the Court. So long as the Great Powers continue to choose candidates who are personally qualified to be Judges, there can be no reasonable doubt that this will continue to be true. Therefore, owing to the political changes in the character of the Assembly, the guarantees which the Great Powers thought in 1920 to be essential are no longer needed; their candidates would be elected by the Assembly whether the Council had concurrent rights or not.

This change has been accompanied by another no less striking, and one which would have seemed in 1920 to be no less unlikely to come about. For since then the Great Powers have lost their majority of votes in the Council—the majority upon which the whole scheme of the Hague Jurists' system had been built. Now they have no more than five seats out of fourteen, and in all human probability their majority can never by any means be regained. As a result, the guarantee of the Hague Jurists' system has become a shadow; a "coalition" of small states against the Great Powers would be as easy to organize in the Council as in the Assembly, if not indeed, actually easier; the constitutional, like the political, position has been completely changed.

As a result of these changes the *raison d'être* of the system of double election by the Assembly and Council has disappeared. The political reasons which led to its adoption no longer hold good. The constitutional position upon which it was based has ceased to exist. Since this is so, must we not ask whether the system itself has not become a useless and meaningless complication? Whether it is not now dead wood which should be cut out of the living tree? Whether it is not in the general interest to adopt the simpler plan of election by the Assembly alone? Whether in the general interest the Great Powers should not abandon a guarantee that has proved not to be required and which in any case has lost its strength?

To these questions the present writer offers no firm and definite answer; but he does suggest that they deserve the most careful consideration by the responsible authorities of the League.

X

As a result of the above long and somewhat rambling disquisition, certain specific and concrete conclusions may perhaps be put forward.

With regard to the amendments to the Statute of the Court it may be suggested that ample experience has proved that these amendments are required, and that it is urgently desirable to

remove the obstacles to their coming into force. It is, therefore, important that the Assembly, the Council, and the individual Members of the League—for example, Great Britain—should do everything in their power to secure at an early date the still outstanding ratifications which will bring the amendments into force.

With regard to the methods of nomination and election, experience has shown that there is at least a *prima facie* case for thinking that change of some kind may be required. It is not suggested that another revising Conference, like that of 1929, should be forthwith convoked. The matter needs further preliminary investigation by impartial experts like those who drew up the first Draft of the Statute in 1920. It is therefore suggested that the Assembly should consider at an early date whether it would not be well to create a new Advisory Committee of Jurists to investigate the whole working of the machinery of election to the Court, and in particular the two essential parts of that machinery discussed in Sections VIII and IX above. It is true that no general election of the Court will occur again until 1939; but it is also true that, if change be needed, it may be well to consider the working of the present system before the unsatisfactory experience of 1930 has faded from our minds.

NOTES

BRITISH RESERVATIONS TO THE GENERAL ACT

When the present writer contributed to the last number of this Year Book an article criticizing the provisions of the General Act, it had not occurred to him that a *via media* between its acceptance and rejection might be found in acceding to the Act with reservations which would make the accession almost meaningless. This, however, is the course which the British Government has now adopted, and except that it is on general grounds undesirable to encourage the too prevalent belief that peace can be won by incantation, there seems no reason why critics and supporters of the Act should not be equally content with so ingenious a compromise.

The terms of the British accession are as follows:

(1) That the following disputes are excluded from the procedure described in the General Act, including the procedure of conciliation:

(i) Disputes arising prior to the accession of His Majesty to the said General Act or relating to situations or facts prior to the said accession;

(ii) Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

(iii) Disputes between His Majesty's Government in the United Kingdom and the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;

(iv) Disputes concerning questions which by international law are solely within the domestic jurisdiction of states; and

(v) Disputes with any party to the General Act who is not a Member of the League of Nations.

(2) That His Majesty reserves the right in relation to the disputes mentioned in Article 17 of the General Act to require that the procedure described in Chapter II of the said Act shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the procedure, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the members of the Council other than the parties to the dispute.

(3)—(i) That, in the case of a dispute, not being a dispute mentioned in Article 17 of the General Act, which is brought before the Council of the League of Nations in accordance with the provisions of the Covenant, the procedure described in Chapter I of the General Act shall not be applied, and, if already commenced, shall be suspended, unless the Council determines that the said procedure shall be adopted.

(ii) That in the case of such a dispute the procedure described in Chapter III of the General Act shall not be applied unless the Council has failed to effect a settlement of the dispute within twelve months from the date on which it was first submitted to the Council, or, in a case where the procedure prescribed in Chapter I has been adopted without producing an agreement between the parties, within six months from the termination of the work of the conciliation commission. The Council may extend either of the above periods by a decision of all its members other than the parties to the dispute.

These reservations are a curious sequel to the terms of the official memorandum (Misc. No. 8 (1931). Cmd. 3803) by which they are introduced. The Memorandum calls for a "clear lead" to be given by His Majesty's Government to other governments; it is eloquent on the "powerful contribution to the sense of inter-

national security" that we shall be making, and the "great psychological value in banishing from men's minds the idea of war". More than once it insists that our accession is important because it will "complete an organized system of all-in arbitration", or "provide a means of settlement of every class of dispute". *Parturiunt montes.* After this it seems almost indecent to dissect the absurd little mouse that has been born.

In the article referred to above I criticized Chapter I of the Act as being designed to supersede the conciliation functions of the Council by a multiplicity of *ad hoc* conciliation commissions which, if they were ever appointed, would be without experience or authority. The plan seemed to be based on the mistaken ideal of assimilating as far as possible the procedure of the essentially political task of conciliation to that of a court of justice. This part of the Act has never had many friends in this country, but for some reason Article 38 of the Act precluded us from accepting Chapter III (Arbitration) unless we also accepted Chapter I. In paragraph 3 (i) of the reservations, however, an ingenious way round this difficulty has been devised. We provide that in the case of a dispute, not being a dispute mentioned in Article 17 (that is to say, not one in which the parties are in conflict as to their respective rights, and therefore being one which under Article 21 ought to go to a conciliation commission and then, if necessary, to arbitration), the conciliation procedure of Chapter I is not to be applied unless the Council so determines. Now the present position under the Covenant is that we can always, if we choose, bring our dispute before the Council, and there is nothing to prevent the Council from committing the matter to an *ad hoc* conciliation commission, if it thinks such a procedure appropriate to the particular case in hand. By this simple device therefore of professing to accept Chapter I but providing that our position is to be exactly as it would be if we had not accepted it, we ingeniously circumvent the policy of the Act in linking the two chapters together. The possibilities which a reservation of this type opens out to those who enjoy saying one thing and meaning another are evidently extensive.

The emasculation of Chapter III is equally drastic, for of the classes of disputes excluded by paragraph (1), two, those in sub-paragraphs (i) and (iv), are of the utmost importance.

Exactly how far the exclusion of disputes arising prior to accession or relating to situations or facts prior to accession extends, it is, I think, quite impossible to say.[1] It certainly introduces a large element of uncertainty which is in itself undesirable; when, for example, does a dispute "arise", and what, in such a context, is a "situation"? That it extends very far is certain, and it is interesting to speculate on the motive behind it. Why is the procedure of the Act, which *ex hypothesi* its friends consider good, only good for certain disputes of the future? Why do we propose to lay on our successors in respect of the disputes which we bequeath to them a procedure which we are unwilling to apply to the disputes which have been bequeathed to us? Can the thought behind the reservation be that our predecessors have done certain questionable things which we should not care to defend, whereas our own conduct is so exemplary that our successors have nothing to fear from arbitration? The explanation seems to be too cynical to be accepted, but is there any other?

The reservation of disputes arising out of matters of domestic jurisdiction,

[1] See a discussion of the meaning of this reservation in reference to the Optional Clause by Dr. H. Lauterpacht in *Economica*, 1930, p. 139.

though its wrecking effect is less obvious to the casual reader, is even more far-reaching. We made the same reservation in our accession to the Optional Clause; but whatever the motive then—and the most probable conjecture is that ill-instructed opinion in some of the Dominions insisted on a meaningless concession—it is difficult to see how it could on that occasion have any legal effect at all, since it purported to reserve from the operation of our signature a class of disputes which could not possibly have come under that operation in any case.[1] But the present circumstances are quite different. By accepting Chapter III of the Act we agree that "any dispute not of the kind referred to in Article 17" (i.e. any dispute in which the conflict does not relate to *the respective rights* of the parties) shall go to arbitration, and we then proceed to reserve out of this undertaking the very class of dispute to which, if it is to have any real significance, our obligation to arbitrate ought to apply.

It is not possible to discuss here the exact meaning of the term "questions within the domestic jurisdiction"; I believe myself that *any* claim which does not rest on the allegation of a *right* must necessarily be a claim to something which is within the domestic jurisdiction of the other side, and that the effect of the reservation is therefore not to weaken but to destroy altogether our acceptance of Chapter III. But even if this is an overstatement of the effect of the reservation, if, that is to say, a dispute which does not relate to rights and yet does not concern questions solely within domestic jurisdiction is a legal possibility, there can be no doubt of the magnitude of the exception created. It certainly excludes from this professedly "all-in" scheme the most dangerous sources of international friction.

Only in one respect does the obligation we have now undertaken go seriously beyond those of the pre-war arbitration treaties, namely, in the fact that under Article 41 the interpretation of our reservations will be for the Permanent Court; but the effect of this has been largely neutralized by giving the reservations so wide a scope that it is unlikely that even the most restrictive interpretation could oblige us to arbitrate a dispute which we should not otherwise be prepared to settle in that way. Apart from this, the old formula excluding differences which affect "vital interests, independence, or honour" might as well have been retained; it was at least more candid and less circumlocutory. That formula is anathema to the school of thought which has imposed the General Act upon the country, yet in the result they have failed to effect anything but a change of words. The explanation is simple; it is merely that the realities of the problem of peace are too strong for the theory that arbitration can be made a panacea against war. The defect of the pre-war system was not that it excluded the more difficult disputes from the obligation to arbitrate—in that its instinct was sound—but that it failed to provide an alternative method for ensuring that the excluded class of dispute should not lead to war, and in particular that it had not been realized that peace depends on the progressive institutionalizing of international life more than on anything else. That defect has largely been made good since

[1] Dr. Lauterpacht is so reluctant to believe that the British Government may have used words which had no legal meaning that he suggests that the effect may be to reserve the right of unilaterally determining whether a dispute is within our domestic jurisdiction or not (*ibid.*, p. 150). I regard the former explanation as far more probable, and it has the support of the official Memorandum on the Optional Clause (Misc. No. 12, (1929). Cmd. 3452).

the war, and nothing could be more misleading than to say, as the official Memorandum does, that because the Pact of Paris did not provide machinery for pacific settlement, "there was, therefore, need for some positive provisions establishing such machinery". The machinery had been created before the Pact of Paris was conceived. No wonder that peace seems insecure to so many when its keenest advocates show so little confidence in the League that they speak and lay their plans as though it did not exist.

J. L. Brierly.

THE MIXED ARBITRAL TRIBUNALS CREATED BY THE PEACE TREATIES

The Mixed Arbitral Tribunals, which were established by the Treaty of Versailles and by the other Peace Treaties which followed it, constituted a new departure as far as peace treaties are concerned. Special tribunals of an arbitral nature to decide claims against governments by individuals or disputes between governments had, of course, often been created, but the establishment of tribunals which were to decide alike claims by private individuals against governments and disputed claims by individuals against individuals was a novelty in international affairs. The jurisdiction of the courts of the countries concerned was interfered with in many respects by the establishment of the Mixed Arbitral Tribunals: and cases between nationals of the countries concerned which would, in the ordinary course, have been within the jurisdiction of national courts were withdrawn from that jurisdiction and placed under the jurisdiction of the newly created tribunals.

The High Contracting Parties agreed to regard the decisions of the tribunals as final and conclusive and to render them binding upon their nationals.[1]

The jurisdiction thus given to the tribunals included:

(i) Claims founded on debts due from individual nationals and to individual nationals of all the Powers parties to the Treaties who were resident in their respective countries on the day appointed for the coming into force of the Treaty in question;

(ii) Claims of nationals of the Allied and Associated Powers against the governments of the Central Powers: the nationals of the Central Powers, however, had no corresponding rights against the governments of the Allied and Associated Powers; and

(iii) There were further provisions, solely for the benefit of the nationals of the Allied and Associated Powers, by which the tribunals could rescind certain judgments given and measures of execution taken during the war by the courts of the Central Powers and give compensation to the aggrieved national of the winning side in the war.[2]

A wide jurisdiction was given by Article 304 of the Treaty of Versailles, &c., with regard to questions relating to contracts, but the article contained a reservation as to "questions which, under the laws of the Allied, Associated, or Neutral Powers, are within the jurisdiction of the national courts of those Powers.

[1] See Article 304 (g) of the Treaty of Versailles and the corresponding Articles in the other Treaties.

[2] See Articles 300 and 302 of the Treaty of Versailles and the corresponding Articles in the other Treaties.

Such questions shall be decided by the national courts in question, to the exclusion of the Mixed Arbitral Tribunal. The party who is a national of an Allied or Associated Power may nevertheless bring the case before the Mixed Arbitral Tribunal if it is not prohibited by the laws of his country". In practice the meaning and extent of this reservation were hardly ever subjects of discussion, at any rate before the Tribunals which sat in London.

A further far-reaching power, of an appellate nature, was given to the Tribunals[1] by the Articles providing that "Where a competent court has given or gives a decision in a case covered by (any of the relevant sections of the Treaty) and such decision is inconsistent with such sections, the party who is prejudiced by the decision shall be entitled to obtain redress, which shall be fixed by the Mixed Arbitral Tribunal. At the request of the national of an Allied or Associated Power, the redress may wherever possible be effected by the Mixed Arbitral Tribunal directing the replacement of the parties in the position occupied by them before the judgment was given by the German court". Very little use was made of this provision before the Tribunals sitting in London, but the article seems to leave open the right to apply in future cases, and no doubt provisions will be made for tribunals to deal with such cases if any arise.

The tribunals had also a jurisdiction in respect of rights connected with industrial, literary, and artistic property as defined by the International Conventions of Paris and of Berne, i.e. chiefly patents, copyrights, and trade marks.[2] Cases in which the protection given by these articles was invoked were very few, but some of them were of great importance and involved large sums of money.

The Treaties, generally speaking, created no new law concerning the contractual or other legal rights of the parties except in so far as they altered or extended the times for performing certain acts or the times within which prescription ran under the laws of the country in question: but they did, with certain exceptions, sweep away all contracts which were pending at the outbreak of war (and in that sense executory contracts), leaving only extant the pecuniary obligations arising out of acts done or money paid under such contracts.[3]

In the course of discharging their duty under the Treaty, the Anglo-German, the Anglo-Austrian, the Anglo-Hungarian, and the Anglo-Bulgarian Tribunals sitting in London dealt with some 11,000 or 12,000 cases, of which the great bulk were cases before the Anglo-German Tribunal. In fact so large was the number of cases before that Tribunal that finally three divisions were created. This creation of divisions of the Tribunal caused some very difficult problems to arise, owing to the divergent views occasionally taken by the various divisions as to the meaning of the Treaty, and the fact that the Treaty provided no machinery for reconciling them. These problems were never completely solved, though in practice a working arrangement was arrived at.

Of the Tribunals sitting in London, the Japano-German Tribunal tried the smallest number of cases.

Each Tribunal or Division of a Tribunal was constituted of three members:

[1] See Article 305 of the Treaty of Versailles and corresponding Articles in the other Treaties.

[2] See Articles 306, 308, and 310 of the Treaty of Versailles and corresponding Articles in the other Treaties.

[3] See Article 299 of the Treaty of Versailles and corresponding Articles in the other Treaties.

one appointed by each of the governments and a President to be chosen by agreement between the two governments, or, in default of agreement, by M. Ador.[1] Of these, the President chosen was a national of a country which had been neutral during the war, and the two other members were nationals of the countries concerned.

With regard to language, the Treaties provided that the language in which the proceedings should be conducted should, unless otherwise agreed, be English, French, Italian, or Japanese as might be determined by the Allied and Associated Power concerned. English was in fact the language used by the Tribunals sitting in London.

The Treaties also provided that secretaries could be appointed by each of the Powers concerned, and secretaries were in fact appointed. Upon them devolved a most important, onerous, and often delicate task, and their duties were admirably performed. Upon the first secretaries of the Anglo-German Tribunal, as the organizers of the first secretariat, the burden was a particularly heavy one.

The Anglo-Austrian, the Anglo-Hungarian, and the Anglo-Bulgarian Tribunals were subsequently created and organized. Each Tribunal drafted its own rules.

The Treaties provided for the appointment of Government Agents,[2] who were given wide powers of controlling the cases presented by the nationals of their respective countries. The work of the Government Agents was extremely heavy and they rendered very great assistance to the Tribunals. As events developed, the work of the British and of the German Agents came to differ somewhat. The governments were, by the Treaties, made respectively responsible, with certain exceptions, for the payment of debts by their nationals.[3] These payments[4] were to be paid or credited in the currency of the Allied or Associated Power concerned, and the purchase of these currencies would have meant a very heavy further expenditure for the German debtors. Owing to the operation of the German Imperial Clearing law the German debtor discharged his debt as between himself and the German Clearing Office by payments made in the depreciated German mark: on the other hand where a German creditor was entitled to a payment from a British debtor the German Clearing Office paid him in the depreciated German mark currency although the British debtor had paid to the British Clearing Office the pre-war sterling equivalent of the debt. But as the German currency fell, at first gradually, and later rapidly, the result was that neither German creditors nor German debtors had in the end any appreciable interest in the payment or receipt of debts. The German Government Agent and his staff were accordingly as a rule not only the representatives of the German Government but also the only representatives of the German creditor and debtor nationals, whilst the British Government Agent and his staff did not represent the British nationals who came before the Tribunal as creditors or debtors. But the British Government Agent assisted the Tribunal by presenting the Government view, and as a sort of *amicus curiae*, a role which the German Government

[1] The only individual, with the exception of Sir Eric Drummond, who is mentioned by name in the Peace Treaty.

[2] See Annex to Article 296, paragraph 18, of the Treaty of Versailles.

[3] See Article 296 (b) of the Treaty of Versailles.

[4] See Article 296 (d) of the Treaty of Versailles.

Agent was also ready to undertake. The fact that the German nationals had latterly little financial interest in the result probably made the task of the German Clearing Office and the German Government Agent more difficult as regards obtaining information and evidence.

The problem of obtaining evidence and securing the attendance of witnesses was one of great difficulty. Witnesses do not as a rule like to be summoned to a foreign country. The attendance of the English witnesses was more easily obtained. German witnesses were, as a rule, heard on commission in Germany and their evidence was taken before an *Amtsgericht.* The German *Amtsgerichte* rendered all the assistance in their power, but evidence on commission is not as satisfactory as the evidence given by the witness in person to a tribunal. Moreover, the methods of examination, cross-examination, and re-examination in England are not those of Germany, and the advisers of British litigants sometimes seemed embarrassed by the differences of procedure, when evidence was taken before an *Amtsgericht.* Such difficulties in the presentation of evidence are among the most troublesome for an international arbitral tribunal. On the whole they were surmounted satisfactorily—in most cases—and relatively little oral evidence was presented. Affidavits were not admitted.

The judgments of the Tribunals were, with few exceptions, given, like the advices of the Privy Council, as the decision of the Tribunal as a whole; and this course seems particularly desirable where the members of the Tribunal are appointed by different countries. The decisions were signed by all three members of the Tribunals, but it must not be inferred from this that the Tribunal members were unanimous in every one of the thousands of cases decided, although as time went on a Tribunal jurisprudence developed. Questions of fact were still questions on which individual views, naturally, tended sometimes to differ. What seemed important, however, was to maintain the Tribunals as true Courts of Justice with three judges, all three members acting as real judges, and to avoid the tendency of arbitral courts to develop into mere arbitrations with two "advocate arbitrators" and an umpire.

The laws to be applied were, in the main, the German Codes and the English law, but any of the laws of the British Empire might have been applicable in cases coming from Scotland, the Dominions, or the Colonies. All these were considered as laws of the Tribunal and consequently expert evidence as to these laws was not admitted. On the other hand expert evidence of other law was admitted—e.g. of the laws of Greece and Brazil. The former German laws such as the laws of the Hanseatic cities before 1870 were treated as German law. On one occasion a particularly knotty point was referred to the Supreme Court at Hamburg, which, to assist the Tribunal, very graciously examined the questions of law and gave an opinion.

There remains also what may be called the law of the Treaty. That is to say the interpretation of the meaning of the Treaty itself. This gave rise to many arguments which were mainly urged by the Government Agents, who sometimes took views entirely contrary to those urged by the representatives of their own "nationals", for to the governments the maintaining of the true principles was more important than the decision of a particular case in favour of one of their own nationals. There were also, of course, questions of International Law.

Right of audience was given to litigants in person, to all lawyers—barristers, solicitors, *Rechtsanwälte*, &c., and to patent agents in patent cases. Patent agents

availed themselves of this right in only one or two cases. Relatively few solicitors conducted cases, and few litigants appeared in person. The British side was often represented by the most distinguished members of the Bar and on occasions very well-known German lawyers appeared. The sums of money at stake were often very large but sometimes very small. It is thought that the smallest claim was one by a liquidator for 5½*d.*, while the largest award approached a million sterling: some of the largest claims were settled by the parties before an award was made.

It may be not uninteresting to refer to some of the points which arose. Many questions of nationality came up for decision, as only nationals of the states in question could litigate or be proceeded against before the Tribunal.

In Case No. 297, *Hein* v. *Hildesheimer Bank* (No. 14, *Recueil des Décisions*, p. 71) the creditor, a German by birth, had taken out a certificate of naturalization in 1901, but, according to German law, he had not on the facts of the case divested himself of his German nationality. He had at the critical date a dual nationality. The Tribunal held that this was immaterial, for whether he had or had not lost German nationality he had on the critical date British nationality.

In another case the creditors were two men from the Ukraine, Russians, who carried on business in partnership (offene Handelsgesellschaft) in Germany, at Leipzig. It was held that as no member of the partnership was of German nationality and the partnership was not a "person" the claim did not come within Article 296 of the Treaty, which gives jurisdiction only where creditor and debtor are nationals of the High Contracting Parties. (*Hyman* v. *Wydra und Söhne*, No. 5, *Recueil des Décisions*, p. 291.)

Further difficulties had to be dealt with in cases in which some of the partners of a firm were and some were not nationals of the states concerned. Ultimately the principle was evolved and laid down that in dealing with debts due to partnerships of which the members are of different nationalities and of which any of the partners are either nationals of an opposing power or neutrals, the portion of the debt to be settled through Clearing procedure is to be ascertained by reference to the proportion which the partner or partners entitled to notify a debt to the Creditor Clearing Office would have taken of the assets of the firm if it had been wound up on August 4, 1914. (*In re Hardt & Co.* v. *Stern*, Vol. III, *Recueil des Décisions*, p. 19.) The converse is the case where the debt is claimed from a mixed partnership. (*Fisher & Co.* v. *Biehn*, ibid.) If the laws of partnership in particular and the laws generally of Germany and of England had been applied strictly there would have been considerable difficulties in reaching any practical result. The decision ultimately given was one which was both practical and equally applicable to both English and German conditions.

A case of some historical interest was the claim of the executors of the late Lord Acton against the German Government for compensation in respect of the non-payment during the war of an annuity provided upon three rescripts of King Maximilian Joseph of Bavaria. These dated from 1815 and concerned the endowment allocated to domains at Regensburg which had been the subject of a Treaty between Napoleon and the Crown of Bavaria. The validity of the original grants was impugned by the German Government, against which the proceedings were taken under Article 297 of the Treaty: it was further contended that the grants were of the nature of a fief, implying fealty to the Government of Bavaria and that by reason of Lord Acton's British nationality they became forfeit. The

Tribunal nevertheless upheld the claim of the executors and would not accept the contentions of the German Government.

In order that the cases decided might serve as guides to the Clearing Offices in other similar cases, often very numerous, the Tribunals often gave reasoned judgments, in which as far as possible principles were laid down. This, no doubt, took up more of the Tribunals' time than a mere statement of the result of each case, but on the other hand ultimately a great saving of time was probably achieved both for the Clearing Offices and for the Tribunals.

This situation, however, was somewhat altered when divisions of the same Tribunal took different views of the same article in the Treaty and the litigant's success or failure depended upon which division his case came before. The divisions did not consider themselves bound by their own previous rulings or by those of another division.

Instances in which a division overruled its own previous decision did occur, though very rarely, and cases of conflict between the decisions of different divisions were not numerous. There is much to be said in favour of a court revising or reconsidering a principle which has been laid down by itself, especially if there is no appeal or other procedure by which a mistake can be put right. Of the supreme courts of the world, the House of Lords is probably the only one which professes never to alter its views.

Among the earliest cases of general importance to the trading community and the financial interests were the cases arising out of what was called the "cold storage" of bills of exchange. At the outbreak of war many of the discounting houses which had business with enemy countries found themselves liable to pay the bills on presentation but could not be put in funds by the enemy whose bills they had discounted, so as to make the payment. To meet this crisis, as is well known, the Bank of England advanced the money, taking the bills into "cold storage". As the rate of interest was 7 per cent. and compound interest was charged, the amounts ultimately repayable after many years were very much larger than the original amounts due on the bills.

The discounting houses claimed to be indemnified by their enemy customers against this liability. The enemy customers would not agree to this. The Tribunal however, held that the customers were liable. Cases in which this was established were *Huth & Co.* v. *Fahr und Setzer*, No. 5, *Recueil des Décisions*, p. 286, and *Fruhling und Goschen* v. *Breyer*, No. 12, *Recueil des Décisions*, p. 860.

Much doubt prevailed at first as to whether certain cases of seizures by the German Government in occupied territory came within the jurisdiction of the Mixed Arbitral Tribunals or within that of the Reparation Commission. The matter was one of practical importance, as those who came before the Tribunals received payment in full of their established claims, while those who went before the Reparation Commission received only part, as there were not funds available sufficient to pay in full.

There was not much difficulty where the goods seized were not removed from the occupied territory, but were used there.[1] But where the property had been seized and taken to Germany it was contended that the Tribunal had jurisdiction under Article 297 (e).

[1] See *Weiss, Biheller, and Brooks* v. *German Government*. Vol. I, *Recueil*, p. 850; Claim 100, *Jacobs Bros.* v. *German Government*.

In the case of *Tesdorpf & Co.* v. *German Government*, Vol. III, *Recueil des Décisions*, p. 22, bags of coffee belonging to the claimants had been seized by the German Government at Antwerp, sent to Altona in Germany and marked "for Army supplies" and their value had been fixed by the German Indemnification Commission. The claimants contended that the seizure at Antwerp did not expropriate the coffee—and that the coffee was theirs till it reached Altona and was there expropriated. The Tribunal, however, took the view that the seizure was under Rule 52 of the Hague Rules and divested the claimants of their property in the coffee, even though the seizure was an abuse of the right given by that Rule, which is only the right to seize for the use of the army in the territory where the seizure is made.

A claim for seizure of cotton in occupied territory was made in the case of *Ralli Bros.* v. *German Government*, Vol. III, *Recueil*, p. 41, but the Tribunal held that this fell within Article 232, paragraph 9 of Annex I to Section I of Part VII of the Treaty of Versailles, and therefore was a matter for the Reparation Commission and not for the Mixed Arbitral Tribunals to deal with.

But where the goods in question were only removed from occupied territory in Russian Poland and sent to Germany for safe custody and later on sold there by the German Government, the claim for compensation under Article 297 (e) succeeded. (*Spedding* v. *German Government*, Vol. VI, *Recueil*, p. 41.)

Another large group of cases which gave rise to strenuously contested claims was that of continuation bargains on the Stock Exchange, where the brokers had themselves "taken in". Such bargains were very numerous at the outbreak of war and very large amounts were involved. It was ultimately decided that such contracts were dissolved by the Treaty, and left no pecuniary obligation outstanding which could be enforced against the client by the broker. The broker by "taking in" was acting as a principal and he therefore could not say that he was acting as an agent or "mandant" and that as such he was entitled to be indemnified as the discounters of the bills had been held to be.

It has often been said that a court must not only do justice but must also seem to do justice. Hurrying on the trial of cases, shortening the time given for the presentation of the case and the like, often fail to save time in the long run and moreover often give the impression that justice is not being done. But much may be done to save time and expense by means of an effective interlocutory procedure. Much was in fact done in this regard by the Tribunals. The pending cases were at an early stage looked into by the members of the Tribunals, and the litigants' legal advisers were asked to state what steps were really necessary to get the case ready for effective trial. Little of this work was known to the public in general. The powers of the Tribunals in this respect were, however, limited by the fact that the Treaty provided for nothing in the way of devolution of work to subordinate officers—such as the interlocutory proceedings before Masters and Registrars. In consequence a preliminary hearing which resulted in directions only was a common feature of proceedings. It was, however, possible to employ experts from neutral countries, skilled in business methods and particularly in book-keeping, to report on figures appearing in books and documents; this procedure was employed in some of the larger cases against the German Government, one of which resulted in an award of some hundred thousand pounds. This, however, was in no sense a devolution of judicial power.

Finally, the fact that litigants had by the Treaties been deprived of their rights

to resort to the ordinary courts and the fact that no appeal of any sort lay from the decisions of the Tribunals called for the exercise of the greatest care in dealing with the work that came before the Tribunal. The writer of this article believes that this obligation was never forgotten by those who sat as members of the Tribunals and it may be not amiss to lay emphasis on the great efforts the Tribunals made to arrive at decisions which were just and judicially sound. The work was not made less difficult by the fact that each Tribunal consisted of three persons of different nationalities with different systems of law, and called upon to interpret treaties which were not entirely free from lacunae and obscurities. It may perhaps not be considered surprising that in these circumstances some decisions were subjected to criticism in the various countries.

THE INTERNATIONAL LAW ASSOCIATION

FOUNDED in 1873, mostly on American initiative, being in fact one of the indirect results of the successful Alabama Arbitration, the International Law Association visited America for the third time in 1930 and there held its 36th Conference—from September 2nd to 9th—at the invitation of its important American Branch.

The sessions were held in the House of the Association of the Bar, graciously placed at the disposal of the members, and took place under the Presidency of the Hon. John W. Davis, who was United States Ambassador to the Court of St. James's from 1918 to 1921.

The programme was a long one and would have been overburdened but for the excellence of the committee work which preceded it. In itself it was evidence of the wide interest of the active members in international law both public and private.

The subject which perhaps attracted most journalistic attention was a draft convention designed in its essentials to secure neutrals better security at sea than was accorded to them in the late war, but without damage to the imperative demands of belligerents. Newspaper attention was rather centred on two resolutions which seemed logically to result from observance of the Paris Pact—the one would refuse belligerent rights to pact-breakers as against neutral trade, and the other would condemn the supply by neutrals of any aid or comfort to a pact-breaker. In the result a minority, composed chiefly of Americans and not large in number, managed to adjourn the discussion; and indeed the time limit was exhausted. A resolution passed by the closing session compensated for some disappointment by urging in effect that the Pact should be implemented by its practical development. The only other subject-matter for the work of a committee which had reference to war, was "The Effect of War on Contracts"; this occupied undivided attention for two days and resulted in an interim report, the major part of which consists of a declaration of both principles and rules, leaving over for further consideration some special contracts, such as Insurance. The leading principle was adopted that contracts between residents in the territories of opposing belligerents should be voided, in spite of considerable argument in favour of the contrary norm. The exceptions both by suspension and by survivor are duly set out. The Dutch delegation carried a resolution, contrary to the proposals of the Committee, that for the purpose of facilitating the collection of debts during the period of the war, an organization should be set up in each of

the belligerent countries permitting the collection of debts due from nationals and the consequent discharge to a like extent of the obligations of debtors.

Turning to the law of peace-time, a useful resolution was passed, intended to regulate the Legalization of Documents for the purpose of their admissibility as evidence in another country. A detailed survey of the laws of Social Insurance in different countries terminated in recommendations intended to protect the foreigner by treating him as well as the native. The consideration of C.I.F. contracts was adjourned. As to Trade Marks, the Conference favoured liberty to transfer on the occasion of the transfer of that part of the business to which the trade mark actually relates, approved the movement to make a foreign mark independent of the mark of the country of origin, and was in favour of protecting against misuse well-known names and marks even when not registered. In the session on Commercial Arbitration, it was resolved that "It is necessary that agreements between governments be entered into to regulate the essentials of arbitration practice and procedure between nationals of their respective countries and to provide for the reciprocal enforcement of commercial arbitration agreements and awards made pursuant thereto, provided that these arbitrations are conducted under institutions of high standing which possess necessary facilities".

Five principles were passed as recommendations which should be adopted in Aerial Law. The report and discussion should be seen in detail, as well as the valuable paper by Dr. Doering of the *Lufthansa*, whose work was the foundation of the report. In the department of Codification, Senor A. Alvarez, chairman of committee, was entrusted with the task of drafting its fundamental principles for examination in committee and for submission to what has since been fixed as an interim conference in July of this year. In cases of Insolvency which involve international money obligations, the Conference favoured liquidation under systems of arrangement or concordats, and this problem will be further considered. The Protection of Minorities under the Peace Treaties was a resumed subject, on which the Conference accepted the recommendations of the committee, which supported the proposal for the appointment of a Permanent Minorities Commission at Geneva. A long report on the Protection of Private Property, drafted by Dr. J. C. Witenberg, was presented, and five resolutions were adopted which recognized the obligation to make full compensation in case of expropriation or of prohibition of trade, whether the owner be native or foreign and with no discrimination against the latter. The report of the committee on Unfair Commerce was mostly concerned with the Convention for the Protection of Industrial Property of 1883 as amended at the Hague Conference of 1925, the action of certain states following the example of Germany (1909) in applying the Convention, and the draft Convention of the committee presented at the Warsaw Conference of 1928. As a result, the committee was instructed to prepare a comparative report on the relevant law in different countries, for presentation to the 1932 Conference. The report on Cartels, a subject so appropriate to economics, was confined to legal questions, and a further study of problems will be pursued with a view to completing the statement of uniform principles which should govern international cartels.

The Hon. John W. Davis presided at the closing session, when an invitation was presented from Hungary that the next Plenary Conference should meet in 1932 in Budapest. This has since been accepted by the Executive Council.

THE IMPERIAL CONFERENCE 1930 AND "ARBITRATION"

This is not the place—nor perhaps is it yet (April 1931) the time—to discuss the provisions of that new "Statute of Westminster" which the Parliament at Westminster is to pass "relating to the Colonial Laws Validity Act and other matters".[1] For these things belong to the law and practice of the Constitution of the British Commonwealth and are not matters international in the ordinary sense of the word. Let us only recall that Lord Coke tells us[2] of a former Statute of Westminster "they were sage men that made this Statute", citing for authority a Chief Justice of the Court of Common Pleas, and again that "as our books speak, King Edward the First was the most sage king that ever was"; and, so recalling, let us pray for an equal measure of sagacity in the Crown and Parliament that will enact the new Statute of Westminster.

Such a prayer will perhaps not seem out of place when we look at the conclusions of the Conference on the question of the institution of a "Commonwealth Tribunal" for the solution of "disputes which may arise between the Members of the British Commonwealth". If these conclusions are to be carried into effect, we shall have less efficient machinery for settling disputes between governments within the British Commonwealth than that which exists for disputes between Members of the League of Nations. The League has the Permanent Court of International Justice, the Commonwealth is to have no permanent tribunal at all. Members of the League who have signed the Optional Clause are—speaking broadly—legally obliged, and Members of the League who have not signed the Clause are under a moral obligation (Article 13 of the Covenant), to submit justiciable issues to the Permanent Court. The Imperial Conference expressly rules out any similar legal and even any moral obligation for Members of the Commonwealth. And this is done "in order to avoid too much rigidity".

The tribunals to be set up for the decision of Commonwealth inter-governmental justiciable disputes are *ad hoc* arbitration tribunals of the pre-1914 pattern, not a permanent court; they are to consist of five members in all, two of whom are nominated by one party and two by the other, one of each pair being chosen from a State Member of the Commonwealth not involved in the dispute, and the other "from any part of the Commonwealth with complete freedom of choice", the Chairman alone being appointed not by the disputants but by the semi-impartial method of choice by the four disputants' nominees, no provision being made for the case of a deadlock. Thus presumably in a case between, let us say, Canada and New Zealand, Canada will name two arbitrators, both from the Commonwealth, with liberty as to one of them only to name a Canadian, and New Zealand will do the like under similar restrictions. The four arbitrators so named will then be at liberty to choose as Chairman whom they will, either within or without the Commonwealth, but if they fail to agree no solution is provided. This means in effect, as the history of pre-war arbitration shows, that only the Chairman can be regarded as being expected to be wholly impartial, and the real decision of each case will in all probability rest with him alone.

It thus seems that the League standard of judicial organization is, in the view of the Imperial Conference, too high—or ought we to say too "rigid"?—for the British Commonwealth. The Conference might perhaps have learned something

[1] See *Summary of Proceedings of the Imperial Conference 1930*, Cmd. 3717.

[2] Coke upon Littleton, I. 19 a, and III. 312 b.

from a more humble example—the organization of the tribunal which has existed since 1925 to solve differences between Germany and her creditors, or between those creditors themselves, arising out of the reparation settlement. The five members of that tribunal are elected for a term of five years, not *ad hoc* for each dispute; each party appoints one member only, the three other members (two of whom have to be of a nationality neutral during the Great War and one an American citizen) being appointed by the joint agreement of the two parties, with a provision for ultimate resort to the President of the Permanent Court of International Justice at The Hague. These arrangements worked admirably for five years and were reaffirmed in January 1930 at the Hague Reparation Conference. They ensure that at any rate three of the five members of the Tribunal are impartial and they make the tribunal a permanent institution.

The Conference, while thus not achieving the establishment of permanent machinery for judicial settlement of the disputes which were its more immediate concern, seems to have sought compensation in the international field. It "approved the general principles underlying" the General Act for the Pacific Settlement of International Disputes. What these general principles are was not disclosed. A study of the General Act has led the writer to conclude that one general principle of that instrument is that all disputes, whether political or legal, are in the last resort to be settled by a legal tribunal on legal lines. Is this doctrine approved by the Imperial Conference? The Government of South Africa showed some hesitation. It required time for study. It was well advised. But there was a general agreement to exclude from the General Act matters of "domestic jurisdiction" and in particular immigration. This general agreement has since been carried into effect by the terms of the accession of the Government of Great Britain to the General Act; the meaning and extent of this reservation are discussed elsewhere.[1]

This did not exhaust the appetite of the Conference for what may be called extra-British missionary enterprise. It gave a blessing, with similar vagueness of phrase, to the "principle underlying the proposals which have been made to bring the Covenant of the League of Nations into harmony with the Pact of Paris", though it recommended that the amendments to the Covenant should be contingent on the entry into force of a general treaty for the reduction and limitation of armaments. But who is to say what is the overlying substance and what is "principle"? How shall we separate the pure ore from the dross? And if it is a good thing to amend the Covenant, why should the amendment be made contingent on disarmament? Would not the world be better for an improvement in the Covenant even if it fails to make some progress in the direction of disarming?

Meantime no solution was found or proposed for the vexed and urgent question of the future of the Judicial Committee of the Privy Council. The new proposals apply only to intergovernmental disputes. The problem of the right of the individual subject of His Majesty to appeal to a single highest source of justice in the Commonwealth is left untouched.

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[1] See pp. 130–5 *ante*.

ORIGINS OF THE SINO-SOVIET DISPUTE IN MANCHURIA

To go fully into the origins of the Sino-Soviet dispute in Manchuria, which started in May 1929 and was settled towards the end of the year after an interval of spasmodic and purely local hostilities, it would be necessary to describe in detail the peculiar situation regarding the Manchurian railways, a situation which has always been and still is fraught with possibilities of international dissension. Such a detailed description would be outside the scope of this note, but the following observations are essential to an understanding of the matter.

In 1896 Russia, in order to extend the Trans-Siberian Railway as far as Vladivostok on the Pacific coast and at the same time to avoid having to make a detour round the north Manchurian border, obtained from China by treaty the right to build a railway across Manchurian territory. The details of the arrangement were somewhat complicated, but the effect was that the entire control over the railway, known as the Chinese Eastern Railway, and of the railway zone, was vested in the Russian Government through the Chinese Eastern Railway Company, a Russian joint stock company in which the Chinese were not precluded from holding shares, but in which they in fact never held any. Provision was, however, made that the railway should revert to China without payment on the expiration of a period of eighty years, and China was to have an option to purchase after the expiry of thirty-six years. A little later the charter of the Chinese Eastern Railway Company was extended so as to allow of the construction of a branch line connecting the railway with southern Manchuria and Port Arthur. These transactions had the effect of making Russia the dominant Power in Manchuria, a situation which was not pleasing to the Chinese, but which they were not at that time in a position to alter.

It was not long, however, before a new factor was introduced, namely the rising power of Japan. Hardly had the Chinese Eastern Railway and the south Manchurian branch been opened to traffic than the Russo-Japanese war broke out, as a result of which most of the south-Manchurian branch of the railway (henceforth known as the South Manchurian Railway) was transferred to Japan, China acquiescing. Since that date the Japanese have either built or acquired control of a number of other railways in Manchuria, and must now be considered at any rate potentially as the dominant Power in that country.

Since the war the principal factors in the Manchurian situation have been (*a*) the steady increase of Japanese power and of the activity and importance of the Japanese controlled railways, as a result of which the Chinese Eastern Railway has entered on a period of comparative stagnation; (*b*) the decline of Russian power in Manchuria owing to the Revolution and to the weakening of Russian control over outlying provinces; (*c*) the rise of Chinese nationalism with its policy of ousting the foreigner from control in the affairs of China. In spite of the operation of these factors, the Soviet Government managed to retain the actual control of the railway itself, notwithstanding a temporary supervision by an inter-Allied Technical Board sitting at Harbin, and various conflicting agreements made with different Chinese Governments, coupled with at least one declaration by the Soviet Government that the railway was unconditionally restored to China. In this the Russians were assisted by the chaotic condition of China and the absence of any effective Chinese Government, but there existed at the same time a constant state of friction with the Chinese authorities,

who were always trying, though unsuccessfully, to extend their control over the railway.

In the light of subsequent events, certain of the agreements above referred to require special mention, namely the Sino-Russian agreements of 1924, which provided for an equal division between China and the Soviet Government of the departmental posts on the railway. The real control, however, as already stated, remained in Russian hands. Pledges were also given by both parties not to engage in political propaganda against each other.

Such was the situation until 1926, when the Chinese Marshal Chang Tso-lin was able greatly to increase the Chinese share of control, not so much over the railway itself, as over the railway zone, and over its other activities, the telegraphs, telephones, land department, river fleet, wharves, warehouses, &c. There had occurred some time previously an incident which the Chinese never forgot. M. Ivanoff, the Russian manager of the railway, had taken it upon himself at the time of Kuo Sung-lin's revolt to refuse to carry Chinese troops on the railway. This action was intensely resented by the Chinese, as constituting an abuse of the manager's powers, and it confirmed them in their determination to acquire control of the railway. It should be mentioned that the power of the railway manager was entirely of post-war origin; prior to the revolution his powers were negligible; the funds of the railway were then deposited in the Russo-Asiatic Bank, the money was controlled by a board of directors sitting at Petrograd, and the manager was credited monthly with a fixed percentage of the budget. After the overthrow of the Imperial Government, however, all powers were vested in the general manager. It was this independent authority which the Chinese sought to destroy, particularly in view of the possibility that the existence of the railway was being utilized by the Soviet Government for propagandist purposes, notwithstanding the agreements of 1924. Relations between the Soviet and the Chinese (Nanking) Governments were broken off in 1928, but a Soviet representative remained in Manchuria. By the beginning of 1929, therefore, there existed a state of considerable tension of a character intrinsically likely to lead to active dissension.

The climax was reached on May 27, 1929, when the Soviet consulate at Harbin, a central post on the railway, was raided by the Chinese and a vigorous search for documents was conducted. The consulate staff endeavoured to burn important papers, but a quantity of documents were seized and various persons arrested. It was alleged by the Chinese that at the time of the raid a meeting of communists, connected with the railway and its various activities, and affiliated to the Third International, was taking place, and that the object of the meeting was to promote and carry on Bolshevist propaganda in Manchuria and to make plans for the opening of a campaign of terrorism. Following on this, the Chinese authorities took over complete control of the telegraph administration of the railway and of the land department, and closed down various Russian trade and railway institutions on the ground that the documents seized in the raid proved their connexion with propagandist activities. At the same time the general and assistant managers of the railway and the Soviet heads of departments were dismissed and replaced by Chinese. This action was undoubtedly a breach of the Sino-Russian agreements of 1924, which, as has been mentioned, provided for an equal division between China and the Soviet of the departmental posts, and also provided that the general manager and one of the assistant managers should

be Soviet citizens. The Chinese Government did not deny the breach, but justified it as a necessary emergency measure, alleging that it was forced upon them by the Soviet Government's disregard of the propaganda clauses in the agreements, by which the contracting parties engaged not to carry on any propaganda directed against each other's political or social systems.

The Soviet Government took an unexpectedly firm line in reply to the Chinese action, and issued an ultimatum demanding the restoration of the *status quo* on the Chinese Eastern Railway as a condition precedent to any negotiations for settlement. Desultory negotiations, however, proceeded throughout the summer and autumn, while at the same time hostilities of a local and subsidiary character broke out on the frontier. The Russian attitude remained firm, and moreover was tacitly supported by the Japanese, who feared that the Chinese action in regard to the Chinese Eastern Railway might form a precedent for similar action in connexion with the railways under Japanese control.

It is not within the scope of this note to give any details of the events which led up to the final settlement. It may, however, be mentioned that H.M. Government caused a statement to appear in the press early in December 1929, reminding both parties of their signature and ratification of the Kellogg Pact, and expressing the earnest hope that they would refrain from any direct measures of hostility and would find it possible to come to an agreement by peaceful means. The full text of this statement, which was communicated to both parties through the diplomatic channel, is printed in a foot-note.[1]

A provisional settlement of the dispute was finally reached toward the end of December, and its principal terms were as follows:

The *status quo* on the Chinese Eastern Railway was reverted to on the basis of the agreements of 1924, which both parties undertook to observe. The Soviet

[1] "His Majesty's Government in the United Kingdom have observed with apprehension and concern the course of events between China and the Soviet Union with reference to the situation in Northern Manchuria since July.

The United States Government took steps in July through conversations in Washington to see that the attention of the Chinese and the Soviet Governments was called to the provisions of the Treaty for the Renunciation of War to which both China and the Soviet Union were signatories. His Majesty's Government in the United Kingdom associated themselves with that step. Both the Soviet and Chinese Governments then gave formal and public assurances that neither would resort to war unless attacked. The treaty has now been ratified by no less than fifty-five Powers, including China and the Soviet Union.

His Majesty's Government in the United Kingdom desire to associate themselves with the action which the United States Government are now taking to call attention to the provisions of the Treaty for the Renunciation of War, particularly to Article 2, which reads:

> 'The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or origin they may be, which may arise among them shall never be sought except by pacific means,'

and to express the earnest hope that China and the Soviet Union will refrain or desist from measures of hostility and will find it possible in the near future to come to an agreement between themselves upon a method for resolving by peaceful means the issues over which they are at present in controversy. His Majesty's Government in the United Kingdom feel that the respect with which China and the Soviet Union will hereafter be held in the good opinion of the world will necessarily in great measure depend upon the way in which they carry out these most sacred promises."

personnel of the railway was to be reinstated, together with a Soviet manager and assistant manager, but these latter places were to be filled by different persons, the former manager and assistant being restored to other posts on the railway. Rendition was also to be made of the Soviet consulates and commercial organizations in Manchuria and of the Chinese consulates and commercial organizations in the Soviet Far East. Peace was restored on the Chinese-Soviet frontiers with the withdrawal of troops on both sides, and all persons arrested in connexion with the dispute were to be released. The full resumption of diplomatic relations between the two countries was left open until a Russo-Chinese conference could be called at which all outstanding questions were to be settled. Although conversations have since taken place, it is understood that no final settlement has yet been reached.

G.

NATIONALITY IN THE MANDATED TERRITORIES

The question of the nationality of the inhabitants of the mandated territories—and particularly the territories under so-called B or C mandates—has, from the introduction of the system, caused difficulty and heart-burning. While the Treaty of Lausanne between the Allied Powers and Turkey provided definitely for the nationality of the inhabitants of Palestine, Syria, and Iraq, the Covenant of the League and the Peace Treaty with Germany did not provide for the nationality of the inhabitants of the German colonies placed under the other mandates; and nothing was said about it in the mandate instruments themselves. An early ruling was given by Sir John Salmond, then Attorney-General of New Zealand, that the inhabitants of Samoa did not acquire the nationality of the Mandatory, New Zealand, by the assignment of the mandate, and that under the existing law of New Zealand they could not acquire it by residence in Samoa. The question of the right of the Mandatory to impose its own nationality on the inhabitants of the mandated territory was discussed at the first meeting of the Permanent Mandates Commission in 1921. The general view then adopted was that the inhabitants occupied a new position in international law, and should receive a new legal status. The Commission put forward certain principles, in the form of resolutions, which were adopted by the Council of the League of Nations in 1922:

(1) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory Power.

(2) The native inhabitants are not invested with the nationality of the Mandatory by reason of the protection extended to them.

(3) It is not inconsistent with the former principles that individual inhabitants should voluntarily obtain naturalization from the mandatory Power.

A special question was raised before the Commission with regard to the nationality of the German residents in South-West Africa. While the German settlers in the other mandated territories were for the most part removed, in accordance with provisions of the Peace Treaties, over three thousand of them remained in South-West Africa. The South African delegation proposed that the Mandatory should be authorized to confer British nationality on these Germans by a law of general application, with a proviso that any inhabitant might decline a change of nationality and in that case should not be molested. The Council of the League saw no objection to the proposed action, and the law passed by the

Parliament of the Union in 1924 conferred British nationality on all adult Germans domiciled in the territory who did not decline it within six months. The great majority accepted it. In 1927 the Union Nationality and Flags Act, passed by the Parliament of the Union, prescribed that all British subjects within the jurisdiction of the Union of South Africa, including the mandated territory, whether British subjects by birth or by naturalization, should become South African nationals. Strong objection was taken to the law by the inhabitants of German origin, and the question was raised before the Permanent Mandates Commission at its sixteenth session in 1929. The German member of the Commission, Dr. Kastl, maintained that the imposition of South African nationality on those who had accepted British naturalization was contrary to the principles of the mandate, while on the other hand the Vice-President of the Commission, Mr. van Rees, replied that there was nothing in the law incompatible with the principles passed by the Council of the League. It was sufficiently clear that the later law of 1927 did not seek to impose South African nationality on the native inhabitants of the territory, but only on those persons who had already received British nationality, since a person born in the mandated territory is not deemed by reason of his birth to be a natural-born British subject. The question really in issue therefore was narrowed down to the right of the Mandatory to compel the foreign subjects in the mandated territory, who had voluntarily received British nationality, to receive also the more limited national status of the Dominion. That local nationality is presumably combined with, and not substituted for, the larger British citizenship which is conferred on the persons naturalized under the law of 1924. The point, however, was not made clear at the discussion before the Mandates Commission. And Lord Lugard, the British member, expressed the view that if the law implied that every British subject was compelled to become a South African national or to leave the country without option of declining that nationality, the inhabitants had a great grievance. The law itself does not contain any such threat. The Commission was clearly perplexed over the problem and finally resolved, having regard to its difficulty and its political importance, to suggest to the Council of the League that the question might merit reference to the Permanent Court of International Justice. So far, however, no action of this kind has been taken.

It is interesting to compare with the action of the Parliament of the Union of South Africa the provision in the British Nationality Law passed by the Parliament of New Zealand in 1928, which provides for a system of local naturalization for those native inhabitants of Western Samoa who cannot comply with the condition which requires applicants to have an adequate knowledge of the English language. That Law, which supplements earlier legislation providing for the naturalization of natives of the island, is an application of the third principle laid down by the Council of the League endorsing the right of the Mandatory to naturalize individual inhabitants of the mandated territory who voluntarily apply for its nationality.

A different question of nationality in mandated territories arises in Palestine with regard to the local citizenship which was acquired under an Order in Council of 1925 by Ottoman subjects permanently resident in the country in 1925, by persons born in the country since that date of Palestinian parents, and, lastly, by persons who have satisfied the conditions of naturalization. Palestinian citizenship is something different from British nationality, but Palestinian citi-

zens enjoy—in accordance with the mandate—the protection abroad of British officers. They do not, however, enjoy all the privileges and facilities of British subjects. It is a hardship that the citizens of the mandated country cannot enter foreign countries in Europe without obtaining a visa, although British subjects enjoy that facility. And it is particularly anomalous that Palestinians cannot enter the United Kingdom without first obtaining a British visa. The reason, no doubt, of the discrimination abroad is that any foreign person entering Palestine is required to obtain a special visa from a British consular or passport officer, and so reciprocally the foreign country imposes the obligation of a visa on the Palestinian visitor. But in relation to admission to England the awkward consequence is involved that, while the national of a European state who in Palestine retains his nationality of origin may enter England without a visa, the foreigner who has obtained naturalization in Palestine becomes subject to that additional restriction if he wishes to enter the country of the Mandatory. That is one of the measures which tends to discourage naturalization in Palestine, and the practice merits further examination.

N. B.

THE STATUS OF THE MANDATORY POWER

The long-drawn-out dispute between the Permanent Mandates Commission and the Union of South Africa as to the position of the Mandatory Power in South-West Africa has at last been satisfactorily settled. In a treaty made with Portugal concerning the boundary between the mandated territory and Angola, the Union was described as having powers of sovereignty; and in a law of 1922, providing for the transfer of the railways and harbours of the territory to the Governor-General of the Union, it was stated that the immovable property was vested in full *dominium*. To these terms the Mandates Commission took exception as being in conflict with the principles of the mandates system, and for a time it could not obtain satisfaction. The question went to the Council and to the Assembly of the League in turn. The Assembly adopted the report of the Dutch Foreign Minister that "the relation of the Mandatory and the mandated territory is clearly a new one in international law, and for that reason the use of the time-honoured terminology is sometimes inappropriate to the new conditions". The Union Government has accepted that very discreet observation and communicated its acceptance to the Commission. With regard to the offending words in the law, it has passed an amending law which satisfies the Commission. The South-West Africa Railways Act, 1930, declares that, notwithstanding anything in the original Act, the railways transferred to and vested in the Governor shall be held by him subject to the Mandate issued by the Council of the League of Nations in pursuance of Article 22 of the Treaty of Versailles. The Commission has gained its point, which, though it may appear formal, involves a principle of great importance.

N. B.

THE CONVENTION ON FINANCIAL ASSISTANCE[1]

This convention, in addition to its economic and financial importance, has more than one point of interest for international lawyers.

In the first place, it makes an inroad on the classical doctrine of neutrality: the guarantee by a non-belligerent state of a loan issued by a belligerent is

[1] See pp. 156–7 *infra*.

inconsistent with the rules of neutrality as hitherto accepted. A state which guarantees a loan is not impartial between the belligerents. It definitely takes sides.

Secondly: the Convention deals with the rights of states and individuals as being *in pari materia* and on the same footing; and though in this it resembles other instruments by which the obligations of one state to individuals are guaranteed by another state, the very elaboration of the Convention emphasizes the conclusion that in modern conditions it is impossible permanently to maintain two separate kingdoms of law. The bondholders of a guaranteed loan are individuals; states are their principal debtors and also their guarantors. If the principal debtor state defaults, the creditor can claim against the guarantor state, and the guarantor state then, if it pays the debt, can claim to stand in the shoes of the principal creditor, to be subrogated to his rights, and to have an assignment of his securities. Now if we suppose the absolute separation of the two kingdoms, the rights thus assigned are not rights in international law at all; they must, therefore, somehow change their nature upon assignment. For this, be it observed, is not a case in which a state makes an international complaint on behalf of an injured national, it is a case in which a state takes over and asserts on its own behalf rights hitherto belonging to an individual.

Thirdly: unfettered power of deciding the action to be taken in circumstances the exact nature of which cannot be foreseen—a power which is an essential element of what is commonly called "Sovereignty"—is, for contracting states, not quite what it was previously. The Convention, at any rate for states not members of the Council of the League, compels the use of the national credit in emergencies the character of which cannot be foreseen, and as the result of the decision of a foreign body in the shape of the Council.

Fourthly: we have here something in the nature of a "sanction", less drastic, it is true, but possibly therefore more likely to be put into operation than the provisions of Article 16 of the Covenant.

And all this is the work, not of lawyers, still less of *idéologues*, but mainly of financiers.

J. F. W.

DIGEST OF PUBLIC INTERNATIONAL LAW AS INTERPRETED AND APPLIED BY GREAT BRITAIN

Thanks to assistance generously given by the Laura Spelman Rockefeller Foundation, the London School of Economics has found itself able to arrange for the publication of the first volume of a work to be called a "Digest of Public International Law, as interpreted and applied by Great Britain". The first volume, which is necessarily experimental, will be entitled "States", and will deal with such questions as the nature and classification of states, problems of recognition, succession, &c. In general, it is hoped that the work may serve the same purpose as Moore's *Digest*, and its object will be to collect such diplomatic and judicial material as serves to illustrate the official British attitude towards questions of international law. The first volume will probably be ready about the end of the present year.

H. A. S.

GENERAL CONVENTIONS PREPARED AT GENEVA IN 1930

LEAGUE OF NATIONS

I

Concerted Economic Action: Commercial Convention, Protocols and Final Act.

These instruments were drawn up by a Conference sitting at Geneva from February 17 to March 24. They bear the date March 24. Their object is to create "a suitable basis and an atmosphere of confidence" to enable the parties to ensure the effective application of the resolutions of the World Economic Conference, and for this purpose to proceed to concerted economic action, as contemplated by the Tenth Assembly of the League. The parties accordingly undertake not to denounce before April 1, 1931, bilateral commercial treaties at present in force. States employing the system of negotiable tariffs undertake to notify other states in advance of any increase of duties, and any party feeling itself injured may ask for the opening of friendly negotiation. Should this produce no effect, it may denounce the Convention. Alterations in duties made in virtue of laws or circumstances which require immediate application are not subject to the provisions regarding notice and negotiation. States having the autonomous tariff system undertake not to increase their protective duties during the whole term of the Convention. Should they increase their fiscal duties, a party considering itself injured has the right of denunciation. Without prejudice to the obligations resulting from the putting into force of the Convention on Prohibitions, parties undertake not to aggravate the present situation in this respect. Bilateral treaties denounced before the signature of the Convention are exempted from its operation, and those concluded before that date but not yet in operation may be substituted for existing treaties during its period of operation. Similarly, the Convention allows the replacement of provisional agreements by definitive treaties, or the modification or replacement, subject to negotiation, of prolonged bilateral treaties.

The Convention was originally concluded as for one year from April 1, 1930, and failing denunciation, for another six months. A Conference was to be convoked in November, 1930, to consider the date of its coming into force, and draw up a list of those states whose ratification or accession was considered indispensable.[1]

An Additional Protocol explains certain of the clauses, allows the possibility of exempting colonial areas from the operation of the Convention, and gives certain special facilities to Austria, Czechoslovakia, and Greece.

The Protocol regarding the programme of future negotiations states that the signatories recognize as indispensable concerted action with a view to closer co-operation, the improvement of the régime of production and trade, the en-

[1] The November Conference, in view of the small number of ratifications received up to that date, postponed the time-limit for ratifications to January 25, 1931. Another Conference in March, 1931, reconsidered the situation, and recorded its inability to come to an agreement regarding the putting into force of the Convention, leaving it to a fresh Convention to consider the possibility of reviving the Convention or elaborating another one.

largement of markets and the facilitation of the relation of the European markets between themselves and with overseas markets, so as to consolidate economic peace. The object of the negotiations is to determine the speediest and most effective means of adjusting economic conditions in the respective countries, of organizing more rationally the production and circulation of wealth, and of removing as far as possible unjustified hindrances to the development of international trade. To this end a questionnaire is circulated to Governments, and a list drawn up of subjects on which future negotiation is recognized as desirable. Subsequent action will be decided on by the Council.

The Final Act recommends an investigation by the Economic Committee of the League into the means of establishing closer co-operation and improved trade relations between Europe and the overseas countries, and recognizes that the stipulations laid down in the Convention merely constitute a first stage in the direction of economic co-operation in Europe.

II

Convention on Certain Questions relating to the Conflict of Nationality Laws.

This Convention was drawn up by the Conference for the Codification of International Law, and bears the date April 12, 1930. The preamble sets out as the final ideal, universal recognition of the principle "that every person should have a nationality and one nationality only". While admitting the impossibility of attaining this ideal, under present conditions, through a general codification of international law, it embodies, as a first step, a settlement of those questions relating to the conflict of nationality laws on which agreement has proved possible.

The Convention consists of thirty-one articles in six chapters, five of which deal with general principles, expatriation permits, and nationality of married women and of children and adopted children, and the sixth with the conditions of the Convention. Each state retains its freedom to decide under its own law which are its nationals, and this law is recognized by other states, in so far as it is consistent with international conventions, custom, and generally recognized principles. A person having two or more nationalities may be regarded as its national by each of the states whose nationality he possesses. Within a third state such a person shall normally be regarded exclusively as the national either of the country in which he is habitually and principally resident, or of that with which he appears to be in fact most closely connected. The provisions adopted regarding married women enable statelessness to be abolished entirely in the case of a woman who marries a foreigner or whose husband changes his nationality during marriage. The provisions regarding children eliminate statelessness in the case of a child whose parents are naturalized or are both unknown, or where a change is made in the civil status of the child (legitimation, recognition). Children of parents having no nationality, or of unknown nationality, may obtain the nationality of the state in which they are born if this is not acquired automatically.

The Conference also drafted three Protocols, which are independent of the Convention and opened separately for the signature or accession of states. The first enables an indigent or undesirable stateless person to be sent back, in certain

circumstances, to the country whose nationality he last possessed. The second provides that in a state whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that state and of a father without nationality shall have the nationality of the state in question. The object of the third Protocol is "to determine, in certain cases, the position as regards their military obligations of persons possessing two or more nationalities". This text enables states to exempt persons having a double nationality from military service in one of the countries of which they are nationals. The Protocol is intended to provide a remedy for situations which are particularly common in immigration countries.

III

Unification of Laws on Bills of Exchange, Promissory Notes, and Cheques.

These instruments bear the date June 7, 1930. They are three in number:

1. A Convention whereby the Parties undertake to introduce as it stands the uniform text known as the Uniform Law (instead of "Uniform Regulations" —the formula adopted at The Hague) in their respective countries. This Convention has two annexes:

(*a*) The text of the Uniform Law, which follows very closely that previously adopted at The Hague. Title 1, however, contains only twelve chapters, instead of the thirteen in the Hague Regulations, chapter 13, dealing with conflicts of laws, having been dropped. Some advance has also been made towards greater uniformity. The Uniform Law concerns the issue and form of a bill of exchange, endorsement, acceptance, avals, time of payment, payment, recourse for non-acceptance or non-payment, intervention, parts of set and copies, alterations, limitation. A special title devoted to promissory notes payable to order stipulates how far the provisions concerning bills of exchange are also applicable to promissory notes.

(*b*) The text of the reservations and assimilated articles—the number of which is approximately the same as at The Hague—enabling the Contracting Parties, with reference to the points dealt with, to substitute the special rules of their own laws for the provisions of the Uniform Law, to specify the conditions for the application of these provisions, or in some cases to amplify them.

2. A Fiscal Convention by which the Parties undertake not to subordinate the validity of obligations arising out of a bill of exchange or promissory note to the observance of the provisions concerning the stamp.

3. A Convention embodying a few provisions with reference to the solution of certain conflicts of laws on bills of exchange and promissory notes.

These three Conventions are mutually independent, that is to say, a country can be party to one without being a party to the others. All three come into force after the ratification or accession of seven states, including three of the permanent members of the Council. If, by November 1, 1932, these conditions have not been fulfilled, the Secretary-General will summon a Conference to examine the situation. The Parties undertake to notify each other of laws introduced in execution of the Conventions, as soon as they come into force.

IV

Convention on Financial Assistance.

This Convention, which bears the date of October 2, 1930, is the outcome of a suggestion made by the Finnish Government in 1926. It was pointed out that many of the smaller countries had a defence force totally inadequate to resist aggression under modern conditions, and would be obliged to increase rather than reduce their armaments, unless they could be provided with additional security. They would further be obliged to buy stocks of raw material in peace time, and to start war industries. This could be avoided if they could be certain of being able to supply themselves, without delay, in a sudden emergency.

The idea met with general appreciation, but it took four years' work in the Financial Committee, the Committee on Arbitration and Security, and successive Assemblies of the League, before the details of the scheme were so far perfected as to allow the Convention to attain its final form. On October 2, 1930, this work was completed and the Convention signed by the representatives of twenty-eight states.

The Convention aims at providing machinery for affording financial assistance to states victims of aggression which shall work swiftly, automatically, and with such certainty that a potential victim of aggression could count upon adequately reinforcing its powers of resistance in an emergency. The financial principles involved are similar to those employed in the Austrian Reconstruction Loan, substantial but strictly limited guarantees being undertaken in advance by the countries associated with the scheme.

The Convention does not attempt to define aggression, or to link its operation automatically with any article of the Covenant. A state requiring assistance must appeal to the Council, and receives the assistance unless the Council decides otherwise. As the unanimity rule operates in such cases, a single adverse vote on any occasion prevents use of the Convention. The state which receives assistance undertakes to submit the dispute in question to pacific settlement. The Council can also grant assistance before actual aggression is committed, if one party to a dispute refuses or neglects to conform to methods of pacific settlement, and the outbreak of hostilities seems likely.

The financial aid granted is to be obtained on the international money market in the ordinary course, the government concerned contracting a loan on the security of its own revenues. This credit is fortified by the association with it of two degrees of guarantee. The first consists of an ordinary guarantee by all states signatory of the Convention, the second of a special guarantee by certain states of high financial standing. No state is bound to become a special guarantor, but permanent members of the Council and other states unanimously invited by the other special guarantors may assume this obligation.

The maximum obligation of any ordinary guarantor, in case of default, is a sum bearing the same proportion to 100,000,000 gold francs as the government's contribution to the League bears to the total contributions due from all Members of the League. The special guarantors give in addition a second guarantee, to a total equalling the total sum guaranteed by the governments which are ordinary guarantors.

Loans contracted under the Convention are in the hands of five trustees, who are Swiss nationals, habitually resident in Switzerland and appointed by the Council of the League for a period of five years. The Council, on approving the

grant of assistance, fixes the maximum sum to which the service of the loan may amount in each year. This may not exceed the amount which can be covered by the special and ordinary guarantees, as limited by the provisions outlined above.

Further provisions define in detail the duties of the trustees, the circumstances in which a guaranteeing government may be required to meet its guarantee, and the later reimbursements to be made by the defaulting government to the guarantors. The debt, in such a case, carries compound interest at a rate 1 per cent. higher than the rate of interest on the loan.

INTERNATIONAL LABOUR ORGANIZATION

The International Labour Organization, at its fourteenth session in June, 1930, adopted two Draft Conventions and five Recommendations, for ratification or other action by Members of the International Labour Organization in accordance with the provisions of Part XIII of the Treaty of Versailles.

V

Draft Convention concerning Forced or Compulsory Labour.

This Convention provides for the suppression by signatory states of the use within their territories of forced or compulsory labour in all its forms within the shortest possible period. Forced labour for public purposes only, and as an exceptional measure, is allowed for a transitional period of 5 years, subject to specified conditions and guarantees. Five years after the coming into force of the Convention, the Governing Body of the International Labour Organization will consider the possibility of final suppression without a further transitional period. Forced labour for the benefit of private individuals is absolutely prohibited after the coming into force of the Convention.

Work or services: (1) exacted in virtue of compulsory military service laws for work of a purely military character; (2) forming part of normal civic obligations; (3) exacted as a consequence of a conviction in a court of law; (4) exacted in various specified cases of emergency; (5) for minor communal purposes, do not come within the meaning of the Convention.

The safeguards and conditions under which forced labour is permitted during the transitional period are enumerated in detail. They restrict such labour to cases of real urgency and necessity, limit its duration and assimilate its conditions as far as possible to those of voluntary labour. The Convention comes into force twelve months after two ratifications have been deposited.

Two Recommendations were adopted on the subject. One deals with indirect compulsion to forced labour and with measures which might, in a disguised form, reintroduce the use of forced labour. The second contains provisions relating to the regulations to be issued in order to apply the Convention.

VI

Draft Convention concerning the Regulation of Hours of Work in Commerce and Offices.

This Convention limits the hours of work of salaried employees in commerce and in offices to 48 hours a week, and as a general rule, to 8 hours a day, work being defined as "the time during which the persons employed are at the disposal

of the employer". The weekly maximum may be unequally distributed, provided that not more than 10 hours are worked on any one day. There are also a number of provisions dealing with the possibility of lengthening the working day in order to make up lost time, permanent or temporary derogations, &c. Various measures are also laid down to ensure the due application of the Convention.

The Convention specifies in detail the categories of workers to which it applies. These include the staffs of public or private commercial or trading establishments, including postal, telephone, and telegraph services; establishments in administrative services in which the persons employed are mainly engaged in office work; and mixed commercial and industrial establishments in so far as they are not deemed to be industrial establishments. They exclude the staffs of establishments devoted to the care of infirm or needy persons, or of lunatic asylums; hotels, restaurants, cafés, &c.; and theatres and places of public entertainment. Three Recommendations, however, provide for inquiries with a view to extending the provisions of the Convention at a later date to these categories of workers.

The competent authority in each country is entitled to exclude from the scope of the Convention certain categories of workers, including persons occupying positions of management or employed in a confidential capacity, and travellers and representatives working outside the establishment.

C. A. MACARTNEY.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1930

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE [1]

Order made on December 6, 1930.
Case of the Free Zones of Upper Savoy (Second Phase).

This Order marks the second stage in this important case, the first consideration of which was reported here last year.

It may be recalled that the fundamental question in dispute between the Parties—France and Switzerland—was whether, as a result of Article 435, para. 2, of the Treaty of Versailles, with its annexes, the special customs régime established in the free zones under a series of anterior treaties could be abolished without the consent of Switzerland. The *compromis* or Special Agreement submitted this question to the Court, but contemplated negotiations between the Parties, with a view to a settlement, after communication to them of the Court's opinion and before final judgment. In the event of failure by the Parties to agree, the Special Agreement went on to provide (Article 2, para. 1) that the Court was to deliver a single judgment containing its decision upon the question referred to and settling, "for a period to be fixed by it and having regard to present conditions, all the questions involved in the execution of para. 2 of Article 435 of the Treaty of Versailles".

In the recitals of the previous Order, dated August 19, 1929, the Court set out the conclusion at which it had arrived upon the above question—namely, that Switzerland had a right to the free zones, which could not be abolished without her consent—and by the operative part of the Order allowed the Parties a certain period of time in which to arrive at a settlement between themselves. Negotiations for this purpose were unsuccessful and the matter accordingly now came back to the Court for adjudication in accordance with the Special Agreement.

Both Parties put in documents containing proposals for a settlement, and the Swiss Government invited the Court to pronounce a final judgment in accordance with its views, or, alternatively, if it was not thought possible to render a final judgment at this stage, to declare the French proposal (which involved the abolition of the free zones) incompatible with the rights of Switzerland, and to order an expert inquiry on certain points.

The Order of the Court begins by reciting that the conclusions set out in the previous Order had been confirmed by the Court as at present composed and must be regarded as established for the purpose of the continuation of the proceedings, and accordingly must serve as a basis for the settlement to be contained in the final judgment contemplated by the Special Agreement. Even assuming

[1] Series A, No. 24. The judgments and advisory opinions of the Court and the Acts and Documents relating thereto are issued by the Court in three series, namely, *Judgments* (Series A), *Advisory Opinions* (Series B), *and Acts and Documents relating to Judgments and Advisory Opinions* (Series C). The publisher is A. W. Sijthoff's Publishing Co., Leyden. (English Agents: Butterworth & Co., Bell Yard, London, W.C. 2.)

that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such a very exceptional power could only be derived from a clear and explicit provision, which was not to be found in the Special Agreement. Moreover, it was hardly conceivable that a single judgment should contain, in the first place, an interpretation of the relevant provisions of the Treaty of Versailles, and then a settlement of the questions involved in the execution of those same provisions disregarding or conflicting with that interpretation. The Parties, being free to dispose of their rights, might by agreement embody any provisions they liked in a settlement of their differences and, accordingly, even abolish the régime of the free zones; but the Court did not enjoy the same freedom. Any settlement prescribed by the Court with regard to the execution of the Treaty of Versailles must respect the rights which Switzerland derived from the earlier treaties and instruments relating to the free zones. Such settlement must also respect the sovereignty of France over the territories in question. This sovereignty was complete and unimpaired in so far as it was not limited by the aforesaid treaties, and no obligation going beyond them could be imposed on her without her consent. This principle would prevent the Court from adopting certain of the Swiss proposals in its final judgment without France's consent.

The Order then proceeds to recite that the Swiss Government had made proposals in regard to the free importation into Switzerland of products of the free zones, and the Court observed that, practically speaking, it was in this domain that a settlement might be sought which, without disregarding the rights of the Parties, would bring the zones régime more into harmony with present conditions.

The Special Agreement contains a clause (Article 2, para. 2) providing that: "Should the judgment contemplate the import of goods free or at reduced rates through the Federal Customs barrier or through the French Customs barrier, regulations for such importation shall only be made with the consent of the two Parties". This clause clearly contemplates the consent of both Parties, but does not clearly show whether such consent is to be previous or subsequent to the judgment. It is incompatible with the character of the Court's judgments for it to give a judgment which either party may render inoperative (as would be the case if the consent of both Parties to the regulations were not obtained in advanee), but there is nothing to prevent the Court from embodying in its judgment an agreement previously concluded between the Parties. "Judgment by consent", though not expressly provided for by the Statute, is in accordance with the spirit of that instrument. No agreement exists at the present time with regard to importation free of duty or at reduced rates across the Federal Customs line.

In these conditions, if the Court were now to render its judgment, it would have to confine itself to answering the legal questions relating to the execution of Article 435 of the Treaty of Versailles, and such a solution did not seem desirable having regard to the important position occupied by exemptions from import duty in the Swiss draft. The Parties should therefore be given further time for negotiation on this point, without the Court being thereby prevented from fulfilling its task and giving judgment on points of law should the negotiations fail.

Two more points as to which there was a difference of opinion between the Parties are then dealt with in the recitals of the Order, for the purpose of assisting

them in their negotiations. The "present conditions" which the Parties should take into account are held to be those prevailing at the time of the conclusion of any settlement, except that changes due to the transfer by France in November 1923 of the customs cordon to the political frontier, which, as stated in the previous Order, was unlawful, must be eliminated. Secondly, the Manifesto of the Sardinian Court of Accounts of September 9, 1829, with regard to the boundaries of the zone of Saint Gingolph, is declared to be legally binding and to confer on the creation of the zone the character of a treaty stipulation which France is bound to respect, as she had succeeded Sardinia in the sovereignty over that territory.

The operative part of the Order is as follows:

"The Court

(1) Accords to the Government of the French Republic and to the Government of the Swiss Confederation a period expiring on July 31, 1931, which may be extended at the request of both Parties, to settle between themselves the matter of importations free of duty or at reduced rates across the Federal customs line and also any other point concerning the régime of the territories referred to in Article 435, para. 2, of the Treaty of Versailles with which they may see fit to deal;

(2) Declares that at the expiration of the period granted or of any prolongation thereof, the Court will deliver judgment at the request of either Party, the President being empowered to grant the two Governments the necessary periods of time for the presentation beforehand of any written or oral observations."

The Court on this occasion was differently composed from what it was at the first hearing. Judges de Bustamante and Pessoa, and Deputy-Judge Wang were unable to attend, and Judge Hughes had resigned, and their places were taken by Judges Sir Cecil Hurst and Kellogg and Deputy-Judges Yovanovitch and Beichmann, the remaining members of the Court being on both occasions President Anzilotti, Judges Loder, Nyholm, Altamira, Oda, and Huber, Deputy-Judge Negulesco, and M. Dreyfus, French Judge *ad hoc*. Both Parties agreed to the continuation of the proceedings before the new Bench. As mentioned above, the Order states that the conclusions arrived at in the recitals of the Order of August 19, 1929, were confirmed by the Court as at present composed.

Six out of the twelve judges comprising the Bench, however—namely, Judges Nyholm, Altamira, and Sir Cecil Hurst, Deputy-Judges Yovanovitch and Negulesco, and M. Dreyfus—dissented from the recitals of the present Order, other than those relating to the operative part, in which they concurred, and these judges delivered a joint dissenting opinion. In this they expressed the view that under Article 2, para. 1 of the Special Agreement referred to above, whereby the final judgment of the Court was, besides deciding the legal question in dispute, to settle, having regard to present conditions, all the questions involved by the execution of para. 2 of Article 435 of the Treaty of Versailles, the Court was invested with the same powers in regard to a settlement as the Parties themselves possessed, even to the extent of abolishing the free zones régime.

Judge Kellogg, whilst agreeing with the Order, added certain observations of great importance. In these he expressed the view that the question of competence raised by the present case, a direct decision of which the Court had for the moment avoided by the present Order, was, from the point of view of the Court and the development of the judicial settlement of international disputes,

by far the most important question which had ever been brought before the Court.

Apart from the question of the legal effect of Article 435 of the Treaty of Versailles, which was decided by the Order of August 19, 1929, the principal point of divergence between the Parties in the present phase of the case was as to the interpretation of Article 2, para. 1, of the Special Agreement (the provision cited at the beginning of this report). The French Government took up the position that as the Parties were entirely free to enter into whatever stipulations they might agree upon in establishing the régime of the territories, regardless of the legal rights and obligations of the Parties, the Court had an equal freedom. The position of the Swiss Government, on the other hand, was that the future régime must be established by the Court in strict respect for the legal rights of Switzerland, but at the same time it admitted that certain changes in the modalities of the exchange of goods may be necessary in order to conform with existing conditions, and it was obvious from the Swiss proposal that, even though the Court adopted the view that it was bound to respect the legal rights of Switzerland, it would nevertheless be called upon to lay down extensive customs and other regulations.

If the Court were to adopt either the French or the Swiss contention as to the proper construction of Article 2, para. 1, of the Special Agreement (and Judge Kellogg makes it clear that he agrees with the Order in rejecting the former), it is obvious that the Court would be required to pass upon questions essentially economic and political in their nature, the decision of which is not to be found either in an interpretation of treaties or in the application of rules and principles of law. The effect of Article 2, para. 2, of the Special Agreement (the provision cited above providing for the consent of the two Parties to any customs regulations adopted by the Court) is to cause the Court's decision of these questions to be dependent upon the will of the Parties, which, as the Court has said, is incompatible with its dignity as a Court. It was primarily to avoid the necessity of asking the Parties whether or not they would accept the judgment that the present Order was made. Judge Kellogg expresses the opinion, however, that even if there had been no such limitation upon the power of the Court, it could not, under its Statute, which forms the fundamental law governing its jurisdiction, be competent to decide such questions as those presented by the task of setting up a special customs régime between two sovereign states.

The learned Judge goes on to refer to arbitration before the Hague Tribunal, on the one hand, and to the history of the Permanent Court of International Justice, on the other, and draws a sharp distinction between the two systems. He also examines Articles 36 and 38 of the Statute and comes to the conclusion that this Court is competent to decide only such questions as are susceptible of solution by the application of rules and principles of law. It is not the function of the Court to create contract rights between the Parties, and above all it is not the function of the Court to deal with political questions. In passing upon a political question (which the learned Judge defines as a question which is exclusively within the competence of a sovereign state) there is no rule or principle of law, no norm of equity, justice or even good conscience, which the Court can apply; for, unless limited by treaties, the power of a state in this domain is unlimited.

Nothing could be more fatal to the prestige and high character of a great

International Court of Justice than for it to become involved in the political disputes pending between nations.

The learned judge concludes by stating that, in his opinion, the competence of the Court in this case extends only to the determination of the legal rights of the Parties, and that it could not, even with their consent and at their request, settle such political questions as might be involved in the execution of Article 435 of the Treaty of Versailles.

Advisory Opinion No 17. Delivered July 31, 1930.

The Greco-Bulgarian "Communities".[1]

This case was submitted to the Court by the Council of the League at the request of the Bulgarian and Greek Governments, acting through the Greco-Bulgarian Mixed Emigration Commission. This Commission was set up to facilitate the execution of the Convention respecting Reciprocal Emigration entered into between the two states on November 27, 1919, and the purpose in view was to solve the difficulties which had arisen within the Commission as to the interpretation of certain provisions of the Convention.

Although, as already mentioned, the Greek and Bulgarian Governments were at one in desiring to obtain the advisory opinion of the Court, their delegates were unable to agree either with each other or with the "neutral" members of the Commission as to the precise terms of the questions to be submitted, and the somewhat unusual course was, therefore, adopted of drawing up three sets of questions, formulated by (1) the Commission itself, (2) the Bulgarian Government, and (3) the Greek Government. The questions were transmitted to the Court by the Council in this form.

These questions were all directed to ascertaining the meaning and effect to be attributed to the term "communities", and the provisions relating to "communities" and their property, in the Convention. The points involved not being of much general interest, the Court's opinion does not call for a detailed report.

One of the main differences between the two Governments was that Bulgaria maintained that a "community" must possess juridical personality under the local law, and included Communes, whereas Greece contended that a "community" was a group of persons of the same religion and race, designed to serve the common interests of its members in regard to religion, education, and charity; that the existence of such a community was a question of fact in each case, and that a "community" bore no relation whatever to the Commune.

The Court held that the conception of a community within the meaning of the Convention was the historical and traditional conception prevailing in Eastern countries, namely: a group of persons living in a given country or locality, having a race, religion, language, and traditions of their own, and thereby united in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the education of their children in accordance with the spirit of their race, and rendering mutual assistance to each other. The question whether a particular community conformed to this conception was a question of fact for the Commission. It was immaterial for this purpose whether according to local law a community was or was not recognized as a distinct juridical person. This conception of a community was foreign to the Commune, a territorial, administrative unit constituted by municipal law.

[1] Series B, No. 17.

The Court answered each of the three sets of questions, which raised a number of intricate points, unanimously in every instance. In accordance with Article 71 of the revised Rules of Court, a Greek and a Bulgarian judge *ad hoc* sat on the Bench.

ADVISORY OPINION NO. 18. DELIVERED AUGUST 26, 1930.

Free City of Danzig and International Labour Office.[1]

The question submitted to the Court in this case was as follows: "Is the special legal status of the Free City of Danzig such as to enable the Free City to become a Member of the International Labour Organization?"

This question was submitted to the Court by the Council of the League at the request of the Governing Body of the I.L.O. which had been approached on behalf of the Free City with a request to be admitted to membership.

The Court, as usual, communicated the request for advisory opinion to all the Members of the League and other states entitled to appear before the Court, and considered written statements and oral arguments presented by the Danzig Senate, the Polish Government, and the I.L.O.

The Opinion sets out by defining the scope of the matter to be dealt with. First, it is the effect of the special legal status upon admissibility to the Labour Organization which is the subject of the question. The Court concludes from this that it is only difficulties arising from circumstances which are peculiar to the status of the Free City which it is asked to take into consideration. Secondly, although the question is only so worded as to ask whether the Free City can *become* a Member, the Court has assumed that it is not intended thereby to limit the question to admissibility, but to include the question whether the Free City, if admitted, could participate in the activities of the I.L.O. and fulfil the duties incumbent upon its Members.

The I.L.O. was established by Part XIII of the Treaty of Versailles, and the Court points out that the only provision connected with the admission and qualification of Members is the second paragraph of Article 387, which reads as follows:

"The original Members of the League of Nations shall be the original Members of this Organization, and hereafter membership of the League of Nations shall carry with it membership of the said Organization."

It is not impossible, the Opinion proceeds, that the intention of the Parties to the Treaty of Versailles was that membership of the League of Nations and membership of the Labour Organization should coincide, and that no State or community should be a Member of the Labour Organization unless it was also a Member of the League. This question, however, is not one which is connected with the special legal status of Danzig. It has not been dealt with in the written statements nor in the oral arguments addressed to the Court, and therefore the Court has not taken it into consideration for the reasons given above. The case has been considered solely from the point of view of whether the special legal status of the Free City is compatible with membership of the Labour Organization. But the fact that the Court has given its answer to the question upon this basis must not be taken as prejudging in any way its opinion upon the larger question, if at any time that question should be put to it.

After referring to the relevant treaty provisions, the Court observes that the special juridical status of the Free City comprises two elements; the special

[1] Series B, No. 18.

relation to the League, by reason of its being placed under the protection of the League and by reason of the League's guarantee of the constitution, and the special relation to Poland, by reason of the conduct of the foreign relations of the Free City being entrusted to the Polish Government.

The precise scope of the protection of the Free City by the League and of the guarantee of its constitution have not been exhaustively defined.

The general effect of the reports and resolutions adopted by the Council of the League is to show that the duty of the League is to ensure the continued existence of the Free City on the footing on which it was established in accordance with the Treaty of Versailles, and that it was in order to enable the League to achieve this purpose that the Free City was placed under its protection and the constitution placed under its guarantee. Accordingly, the Council has declared that it is bound to ensure orderly, peaceful, and stable government at Danzig, to protect it from outside aggression and to see that without the consent of the League no fundamental change is made in the Treaty of Paris, nor any change in the constitution of the Free City.

The protection and guarantee of the League would not prevent the Free City from becoming a Member of the I.L.O.

With regard to the conduct by the Polish Government of Danzig's foreign relations, there are no detailed stipulations in the Treaties, but a practice has gradually emerged from the decisions of the High Commissioner and from subsequent understandings and agreements arrived at between the Parties.

It is now common ground between Poland and the Free City that the rights of Poland as regards the conduct of the foreign relations of the Free City are not absolute. The Polish Government is not entitled to impose a policy on the Free City, or to take any step in connexion with the foreign relations of the Free City, against its will.

On the other hand, the Free City cannot call upon Poland to take any step in connexion with the foreign relations of the Free City which are opposed to her own policy. As the High Commissioner said in his decision of December 17, 1921, if Poland were obliged to do so, she would come under the domination of the Free City, and this was certainly not contemplated by the Treaty of Versailles.

The result is that, as regards the foreign relations of the Free City, neither Poland nor the Free City is completely master of the situation. The Free City is entitled to care for her own interests and to see that nothing is done which is prejudicial to them. Poland is entitled to care for her own interests and to refuse to take any action which would be prejudicial to them.

The question whether the special juridical status of the Free City is compatible with membership of the Labour Organization must therefore be dealt with on the footing that the conduct of foreign relations is entrusted to Poland and in consequence the Free City is not in a position to oblige the Polish Government to take any action in the conduct of those foreign relations which is contrary to the interests of Poland herself.

It was unnecessary for the Court, even if it were in a position to do so, to make an exhaustive analysis of the various activities of the Labour Organization in order to determine which of them fall within the category of foreign relations. A proportion may be assumed to fall wholly within the domestic sphere, but it is impossible to avoid the conclusion that some of the steps which a Member of the

Labour Organization would take—some even which it might be bound to take—in pursuing the normal activities of membership would fall within the sphere of foreign relations. Such acts as the ratification of a draft convention or the filing of a complaint against another Member State for failure to observe the provisions of a convention must clearly belong to the field of foreign relations. The Free City as a Member of the Labour Organization could not take any such steps itself. It would be obliged to use the Polish Government as its intermediary, and therefore in all such cases Polish consent would be necessary, because the Polish Government would be entitled to refuse to take these steps on behalf of the Free City if they were prejudicial to important interests of the Polish State.

The Court did not find any provision in Part XIII which absolves a Member of the Labour Organization from complying with the obligations of membership or excuses it from participating in the normal activities of the Organization if it cannot first obtain the consent of some other Member of the Organization.

The Court, therefore, considered that the Free City could not participate in the work of the I.L.O. until some arrangement had been made ensuring in advance that no objection could be made by the Polish Government to any action the Free City might desire to take as a Member of the Organization.

If such an agreement were concluded between Poland and the Free City, the fact that the conduct of the foreign relations of the Free City is entrusted to the Polish Government would not constitute an obstacle to the Free City becoming a Member of the Labour Organization.

But no such agreement exists at the present moment, and the Court was of opinion that it was bound to answer the question upon which it was asked to give an advisory opinion on the basis of the existing situation.

For these reasons the Court, by six votes to four, answered the question put to it in the negative.

Of the dissentient judges only President Anzilotti and Vice-President Huber delivered separate opinions. The former held that inasmuch as the question put to the Court rested on the hypothesis that the Free City might be eligible to the I.L.O. notwithstanding that it was not a Member of the League, the Court ought before answering the question to decide this point of law. The Court could not, in his opinion, give an opinion based on a hypothesis contrary to the treaties in force. The learned President was of opinion that only Members of the League could be Members of the Organization and that, therefore, the Court should have declined to answer the question. Apart from this point, he considered, and Vice-President Huber shared this view, that the special legal status of the Free City would not preclude it from membership.

ALEXANDER P. FACHIRI.

DECISIONS OF THE UNITED STATES-MEXICAN MIXED CLAIMS COMMISSION.

(Continued from previous issues of the *Year Book*.)

The Commission, organized in 1923, has continued to function during the past year with Alfaro of Panama, Nielsen of the United States, and MacGregor of Mexico as commissioners. The great majority of the cases submitted to it have been claims by American citizens against Mexico for indemnities on account of acts of murder, robbery, banditry, unlawful arrests, maltreatment in prison,

denial of justice, inadequate punishment of criminals, and non-performance of contracts. For lack of space only a few of the more important of these cases are referred to here.[1]

In the case of *Martha Ann Austin*,[2] the United States was awarded $6,000, United States currency, on account of the murder of the claimant's husband and for the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the persons responsible for the crime. In the case of *Elmer E. Mead*,[3] where the facts were somewhat similar, the widow was awarded $8,000. The crime was committed in a community known to be infested with bandits and where robbery and other acts of lawlessness were frequent. Under such circumstances, a request for protection was held not to be essential, and the failure to make it did not relieve the public authorities from their responsibility. Several suspects were arrested but none appear to have ever been tried. The Commission emphasized that the mere arrest of a suspect either promptly, or, as in the present case, a long time afterwards, was not in itself a sufficient defence to a charge of failure on the part of a state to meet its international obligations.

In the case of *Lillian Greenlaw Sewell*[4], Mexico was condemned to pay the United States $7,000 for negligence in prosecuting and punishing the murderers of two American citizens, father and son. This was a case of train robbery in which the victims were shot by bandits. Some of the bandits were arrested, but most of them were never apprehended. Several were condemned to death but the sentences were never carried out; two were sentenced to six years' imprisonment but were released after having served less than two years of their sentence. This was inadequate punishment and, according to "international precedents" as well as the precedents of the Commission, it therefore amounted to a denial of justice.

The facts in the case of *Minnie East*[5] were somewhat similar. The husband of the claimant had been assaulted by a Mexican on September 16, 1913, and died the following day from the effect of the blow; the offender was committed to prison on the charge of committing robbery and inflicting physical injury; the judge having in the meantime died, his successor revoked the former commitment and ordered the accused, who was then at liberty, to be tried on the charge of homicide and robbery, although he was never rearrested; from this decision an appeal was taken to the Supreme Court, which sustained the second commitment; but between that date and August 4, 1917, no further steps were taken in the proceedings. The Mexican Government explained the suspension of proceedings by asserting that during the period referred to, Mexico was in a virtual state of revolution. The Commission, however, found that the courts of justice in the State of Campeche, where the crime was committed, were open and capable of performing their functions, and it concluded that there was, in consequence, a denial of justice. The claimant was awarded the sum of $7,000.

[1] Those decided between October 8, 1930, and November 5, 1930—twenty-three altogether—are published in a volume entitled *Opinions of Commissioners under the Convention concluded September 8, 1923, as Extended by Subsequent Conventions between the United States and Mexico*. Washington: Government Printing Office, 1931. Some are published in the successive issues of the *American Journal of International Law*, others have not yet been published.

[2] *Opinions*, p. 108.

[3] *Ibid.*, p. 150.

[4] *Ibid.*, p. 112.

[5] *Ibid.*, p. 140.

In the case of *Lillie S. Kling*[1] the claimant was awarded $9,000 for the wrongful killing of his son by Mexican soldiers and for the failure of the authorities to investigate properly the killing and to punish the offenders. The Mexican Government contended that if the killing was done by soldiers, which it did not admit, Mexico could not be held responsible, because they were not at the time under the command of an officer. The Commission, however, was of the opinion that whether the soldiers were under the command of an officer or not was immaterial, since the killing of an alien by soldiers is always a serious matter and one which calls for prompt investigation, which was lacking in the present case. (As to killing by soldiers, see the cases of *Youmans* and *Garcia*, Year Book for 1927, pp. 184, 185, and the case of *Stephens*, *ibid.*, 1928, p. 159).

In the case of *Louis B. Gordon*,[2] however, a majority of the Commission disallowed a claim for damages on account of physical injuries inflicted upon an American citizen by two Mexican military officers while engaged in target practice, who were never punished. Both had been tried and acquitted because it did not appear which one of the two had fired the shot causing the injury. It was emphasized by the Commission that, at the time the firing was done, the officers were not engaged in the performance of their official duties; their act being of a private character, Mexico could not therefore be held responsible for the resulting injury. In any case, the acquittal of the accused by the lower court and its findings on the points of law involved having been sustained by a superior court, it could not be said that there had been a denial of justice. Commissioner Nielsen, however, vigorously dissented from the conclusion of the majority of the Commission.

Another case involving the responsibility of the state for the acts of its officials was that of *Tribolet*,[3] a naturalized American citizen who was executed by Mexican troops, commanded and accompanied by an officer, forty-eight hours after his arrest on suspicion of robbery, without trial and without an opportunity to defend himself or present evidence of his innocence. Requests by his wife that he be given a trial and allowed the right of counsel to defend him were denied. In harmony with previous decisions of the Commission and the principles of international law, the Commission held that Mexico was responsible for the acts of officials of the individual states forming the Mexican Republic and, there being a manifest denial of justice in the present case, the claimants, members of the family of the deceased, were awarded the sum of $12,000.

Protection of Consul.

In the case of *William E. Chapman*,[4] the United States was awarded $15,000 on account of the failure of the Mexican authorities to give proper protection to an American consul, who was shot and seriously wounded in the Consulate at Puerto, Mexico, on July 17, 1927, and for negligence in taking proper steps to apprehend and punish the author of the crime. Some weeks prior to the attack the consul had received an anonymous letter in which he was informed by the writer that in case Sacco and Vanzetti, who had been sentenced to death by a Massachusetts court, were executed, all American embassies and consulates in Latin America would be dynamited and all diplomatic and consular officials

[1] *Opinions*, p. 36.
[2] *Ibid.*, p. 50.
[3] *Ibid.*, p. 68.
[4] *Ibid.*, p. 121.

killed. The Mexican authorities were informed of this threat, but they "manifested nothing more than a passing interest in the situation" although assurances of protection were given. Adverting to the doctrine of various writers on international law, among them Vattel, Phillimore, and Oppenheim, that consular officials are entitled to "special" protection, that is, a greater degree of protection than private individuals may claim, the Commission said: "It is unnecessary to give any detailed consideration to the appropriate application of generalities of this kind to individual cases. In the instant case the argument with regard to special protection is concerned with a situation in which there was a threat against the personal safety of a consular officer; some assurances of protection of that kind were received by the consul; he was warranted in relying on them; but no such protection was given." The claim that no adequate steps were taken to pursue and capture the criminal in any locality outside the town where the crime was committed and that there was altogether a "manifest failure to meet the obligations of international law" was also sustained. Compare in this connexion the somewhat similar case of *Mallen*, Year Book for 1928, p. 160.

Responsibility of Mexico for the Acts of General Huerta; Effect of War on Contracts.

The case of *The United States of America on behalf of E. R. Helley*[1] involved a claim by an American citizen for damages on account of breach of contractual obligations on the part of Mexico. In 1912 the claimant had entered into a contract with the National Railways of Mexico, by which he became an employee of the company for a period of four years. In 1914 he was discharged, in violation of the terms of the contract, by order of General Huerta, Provisional President of Mexico. The Mexican Government denied liability for the damages claimed, on the ground that Mexico was not responsible for the acts of General Huerta. It argued also that even if such responsibility existed, the landing in April 1914 of American troops in Vera Cruz, in violation of the sovereignty of Mexico, justified Mexico in discharging from its service all American employees. The Commission was of the opinion that, in whatever light the landing of American troops at Vera Cruz and the clash of military forces that followed might be viewed, it seemed clear that, at the time the claimant was discharged, hostilities of some considerable duration might reasonably have been anticipated. After adverting to the cases of cable-cutting by the United States during the Spanish-American War and the case of William Hardman before the Anglo-American Mixed Claims Commission of 1910, as illustrations of what belligerents may do in time of war in destroying property, the Commission concluded that the discharge by the Mexican Government of the claimant in the present case in violation of its contractual obligations could not be considered as arbitrary and unwarranted, since it may not be convenient or even possible when two nations are at war for their nationals to carry on contractual relations. Even if the breach of a contract involves the confiscation of property rights, that may be permissible in the circumstances of the present case without an obligation to make compensation. The Commission accordingly denied the claim for compensation although it expressed regret that it did not feel justified in the light of the principles of international law in making an award.

Opinions, p. 80

ARBITRATION—CANCELLATION OF CONCESSION

In the case of *The United States of America on behalf of P. W. Shufeldt against the Republic of Guatemala*, a claim for damages on account of the abrogation of a concession granted in 1922 by the Government of Guatemala to two Guatemalan nationals who a week later assigned the concession to an American citizen, was submitted by agreement in 1929 to Sir Herbert Sisnett, Chief Justice of British Honduras, as sole arbitrator.[1] By the terms of the concession the concessionaries were granted the right to extract chicle for a period of ten years in certain regions of Guatemala, on the condition, among others, that they should extract a certain minimum quantity of the product during the term of the contract and pay the Guatemalan Government a specified royalty for every quintal exported. In May 1928, four years before the expiration of the contract, the concession was abrogated by legislative decree, among the reasons given being that the concessionary had violated the contract by the employment of machetes for bleeding the trees, that the exploitation was harmful to the national interests, &c. It was also contended by the Guatemalan Government that the contract had never been submitted to the legislative assembly for approval, as required by law. As to the first allegation, the arbitrator held that if there had been a violation of the provisions of the contract relative to the method of extraction, the government, being aware of it, should have taken steps to put a stop to the practice either under law or by arbitration in accordance with the contract, instead of cancelling the concession without notice. As to the contention that the concession had never been submitted to the legislature for its approval, the arbitrator found that it had in fact been so submitted, and the failure of the legislature to raise objection to it must be regarded as approval. Moreover, the government having recognized the validity of the contract for a period of six years and received all the benefits to which it was entitled thereunder and having allowed its concessionary to go on spending large sums in providing the necessary appliances, constructing roads, &c., in reliance upon the good faith of the government, it was now precluded from denying the validity of the contract—indeed, it would, under the principles of international law, be so precluded even if the legislature had not given its approval. Incidentally, the arbitrator reaffirmed the principle that international courts are not as strict as municipal courts in regard to the admission of evidence. Regarding the contention of the Guatemalan Government that the decree abrogating the concession, being the constitutional act of a sovereign state, was not subject to review by any judicial authority, the arbitrator observed that this might be true from a national point of view but it was not true in international proceedings, since it was "a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject".

The claimant was awarded a total indemnity of $225,468·38 to cover the profits which it was estimated he would have earned during the four years in which the contract was to run, certain expenditures he had made, interest on his investment for a period of two years and a sum of $35,000 for "loss of time, injury to credit and grave anxiety of mind" on account of the cancellation of

[1] Text of the award in *American Journal of International Law*, October 1930, pp. 799 ff.

the contract. The claim for a sum to cover legal expenses and the preparation of the case for presentation to the arbitrator was denied, but $35,000 was accorded to cover expenses incurred by the claimant in the effort to come to an agreement with the Government of Guatemala.

ARBITRATION—UNLAWFUL EXPROPRIATION OF PROPERTY OF ALIEN.

The case of *Smith* v. *the Compañia Urbanizadora del Parque y Playa de Marianao*, submitted to Clarence Hale as sole arbitrator by the Governments of Cuba and the United States in 1929, involved a claim by an American citizen for losses and damages on account of unlawful expropriation of the claimant's property by the municipality of Marianao, Cuba, in the year 1919. The said municipality having granted to an amusement company a concession for the purpose of urbanizing the district at and around Marianao beach, which district included certain lands and houses belonging to the claimant, and being unable to reach an agreement with him for the purchase of his property, instituted proceedings in a local court for its condemnation. Within eight hours after the order for condemnation had been issued, and without the knowledge of the claimant, his property was seized and the buildings razed by a force of approximately one hundred and fifty men. His claim for restoration of his property or indemnification for his losses having been espoused by the United States, an agreement was reached, as stated above, for arbitration. The Cuban Government contended that the claimant's property had been expropriated "solely for purposes of public utility" and that the procedure had been in accordance with the constitution and laws of Cuba. The arbitrator found otherwise. The destruction of the property was declared to have been "wanton, riotous and oppressive", nor were the proceedings carried out in good faith or for the purpose of public utility, since the properties seized were in fact immediately turned over by the municipality to the defendant company for purposes of amusement and private profit, without any reference to public utility. The arbitrator accordingly, taking into account the period of time during which the claimant had been deprived of the use of his property—approximately ten years—and the expense to which he had been put in defending his rights, awarded him the sum of $190,000.[1]

ARBITRATION OF GERMAN SABOTAGE CASES IN THE UNITED STATES.

Two important cases involving Germany's responsibility for acts of sabotage committed in the United States during the period of American neutrality were decided in October 1930 by the German-American Arbitration Mixed Claims Commission.[2] Both cases were claims for damages for losses amounting to $120,000,000 on account of two fires which destroyed a railroad terminal in the harbour of New York in July 1916, where a large quantity of munitions was awaiting shipment to the Allied Powers, and a munitions factory at Kingsland, New Jersey, in January 1917, with an enormous quantity of shells. Prior to the entry of the United States into the Great War as a belligerent, it was admitted that German agents, pretended or actual, organized and promoted a

[1] Text of the award in *American Journal of International Law*, April 1930, pp. 384 ff.

[2] The *Lehigh Valley Railroad Company* (the "*Black Tom*" case) and the *Agency of the Canadian Car and Foundry Co. and various underwriters* (the *Kingsland* case). Text of the awards in *American Journal of International Law*, January 1931, pp. 147 ff.

policy of sabotage in America and other countries with a view to destroying property belonging to the enemies of Germany, including also munitions of war intended for exportation to Germany's enemies in Europe. It was admitted by the Mixed Commission that such sabotage was expressly authorized by a cablegram from the German Foreign Office to its Embassy at Washington, although the Commission was of the opinion that the German diplomatic representatives in the United States were not in sympathy with the policy of sabotage and did not, in fact, endeavour to carry it into effect.

But the Commission was in agreement that if the guilt of certain persons who were alleged to be German agents, or who pretended to be such, could be established, Germany should, considering their relation to the German authorities, be held responsible for the loss of property destroyed in the two fires and therefore would be bound to make compensation to the owners. The question before the Commission was therefore one of fact, namely, whether certain persons who were actual or pretended agents of the German Government, some of whom had made alleged confessions, really caused the fires which resulted in the loss. An immense quantity of evidence relating to the whole campaign of sabotage in the United States and filling several thousand pages was laid before the Commission, which sat first at Washington, later at Hamburg, and finally at The Hague. The major part of the award is devoted to an analysis and evaluation of this evidence, much of which, in the opinion of the Commission, consisted of the testimony of liars and self-contradictors, while much of it was also full of discrepancies and improbabilities. The conclusion of the Commission was that the evidence did not establish that either fire was caused by the act of a German agent and therefore Germany could not be held responsible for the loss.

The agent of the United States, dissatisfied with the award, at once filed a petition with the Commission for a rehearing of both cases on the grounds that it had been admittedly established by the evidence that the German Government expressly authorized sabotage in the United States, and had sent its agents there for that purpose, armed with incendiary devices to accomplish them, that one of these agents confessed that he caused the Kingsland fire, that in the "Black Tom" case Germany failed to produce certain documents bearing upon material facts in the case and destroyed other documents, and that the Commission, instead of drawing logical conclusions, indulged in inferences not supported by the evidence.

Compensation for German Private Merchant Vessels sequestrated by the United States.

By a statute passed by Congress in March 1928, provision was made for the immediate return to the owners of eighty per cent. of German private property sequestrated by the United States during the World War, which at the time was in the possession of the Alien Property Custodian. (See the *Year Book* for 1928, p. 129, and for 1930, p. 216.) Among the properties seized were nearly one hundred merchant vessels belonging to various German shipping companies which had at the outbreak of the War in Europe in August 1914, taken refuge in American ports and a good many of which are now being operated by the United States. The determination of the value of these vessels was entrusted to a War Claims Arbiter, appointed by the Government of the United States.

On March 9, 1929, the Arbiter rendered a decision in which he defined the

criteria by which merchant vessels were to be distinguished from public vessels (see *ibid.*, 1930, p. 217). In the latter category he placed fighting ships, including cruisers and other auxiliary naval vessels such as converted merchantmen, tenders, and colliers. For these the United States paid no compensation to Germany. Private merchant vessels which received subventions from the German Government were not treated as public vessels, and compensation was therefore allowed their owners.

In June 1930 the Arbiter rendered a decision in which he awarded $74,243,000 to the German owners of ninety-four merchant vessels. The awards ranged from $36,000 in the case of the *Hermes* to $13,688,000 in the case of the *Vaterland*, now operated by the United States under the name of the *Leviathan*. Among other large German ships now operated under the American flag for which compensation was paid are the *Amerika*, $2,979,000; the *Cincinnati*, $2,387,000; the *George Washington*, $3,851,000; the *Kaiser Wilhelm II*, $3,829,000; the *Kronprinzessin Cecile*, $4,287,000; the *President Grant*, $2,389,000; and the *President Lincoln*, $2,397,000.

James W. Garner.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

Digest of the Decisions of the English Courts during the year 1930.

Introductory Note.[1]

There were no cases in the year under review turning on points of Public International Law. There were, however, some cases of special interest in the sphere of Private International Law.

The cases of *In re Ross* (1) and *In re Askew* (2) are both decisions on the fascinating problem which is generally described as "the question of *renvoi*"—an expression which, however, is inappropriate to describe the manner in which the English courts deal with the problem. Both decisions recognize that when, under the English rules of Private International Law, a given matter is governed by a foreign law,[2] this means that the whole of the law of the foreign country concerned must be looked at, including the rules of Private International Law applied in that country. The rule that a matter is governed by the law of a foreign country is not to be interpreted as meaning merely that the internal or purely municipal law of that country is to apply to the matter. In the only other recent case which is a decision on this question—*In re Annesley*[3]—Russell J. adopted the same rule for the purposes of his decision, although he made it clear that he did so only on the ground of previous authority, and would have come to the opposite conclusion if he had been left free to decide the matter on first impression. These three decisions in fact confirm the rule as stated in Dicey[4] and also in Halsbury's *Laws of England*,[5] and, whatever the conflict of academic opinion on the subject in England, Luxmoore J.'s able review of the authorities in the *Ross* case shows at least that the English decisions have been almost unanimous in following this rule. The rule means (subject to the qualification referred to below) that when, under English law, a given matter is held to be governed by the law of a foreign country, what the English courts have to do is to ascertain how a court in that country would in fact decide the point if it came before it, and, having ascertained this, to decide the matter accordingly themselves. As Maugham J., in the *Askew* case, says, the rule means that, when a matter is held to be governed by the law of the domicil, the English court is not applying the law of the domicil as such, but ascertaining what are the rights in the matter in question which have been acquired in the country of the domicil.

[1] The numbers in parentheses following the names of cases in this note refer to the number of the case in the digest which follows. All cases reported in the Law Reports for 1930 and in contemporary reports covering the same period are reviewed. Cases which will appear in the Law Reports for 1931 are reserved for next year, although they may have already appeared in other reports. (*R.* v. *Corrigan* 47 T.L.R. 27; *The Civilian War Claimants Association* v. *Rex* 46 T.L.R. 581; *Inverclyde* v. *Inverclyde* [1930] W.N. 258 fall into this class.)

[2] It may be the law of the domicil, the *lex situs* or the *lex loci actus*, &c. In the *Ross* case the rule was applied both where the foreign law was the law of the domicil and where it was the *lex situs*.

[3] [1926], 1 Chancery, 692. *Year Book* 1927, pp 188 and 195.

[4] *Conflict of Laws*, 4th ed., p. 68.

[5] Vol. VI, p. 223, note r.

It follows therefore that, in cases where, under English law, the matter is held to be governed by a foreign law (e.g. the law of the domicil) and, under the rules of private international law in force in that country, the matter should be governed by the law of the nationality (e.g. English law), the question as to which municipal law must in fact be applied to the case depends, so far as the English courts are concerned, entirely on what it is ascertained the court in the foreign country would do in these circumstances. It depends, for instance, in the first place, on whether the law of the foreign country, in holding that the matter should be governed by the law of the nationality (e.g. English law), means the whole of English law or only English internal law. If it is found that the foreign law refers only to English internal law in such a case, then the result of the matter is clear, and it is English law which must be applied. If, on the other hand, the foreign law, in referring to the law of the nationality, means the whole of English law, and it appears that there is, in consequence, a *circulus inextricabilis*, the English courts merely ascertain how the foreign court would cut the knot, and having ascertained this as best they can, decide accordingly. It follows, therefore, that the apparent inconsistency in the result between these three cases, in each of which, under English law, the matter was held to be governed by the law of the domicil and in two of which (the *Annesley* case and the *Askew* case) the foreign municipal law was applied, while in the third (the *Ross* case) English municipal law was applied, does not proceed from any inconsistency of principle on the part of the English courts. It simply results from the difference between Italian law, on the one hand, in the *Ross* case, and French and German law, on the other hand, in the other two cases respectively.

The position, therefore, is that English law neither refuses nor accepts the *renvoi*. It has no theory or principle upon this subject at all. It is so astute or so lazy as to defer, in this interesting juridical problem, to the views of the foreign courts. This practice will always work, and there will be no *circulus inextricabilis* unless, which seems unlikely, a foreign law is found which is equally deferential.

It is true, as pointed out by both Russell J. and Maugham J., that the English practice on this point results in its being necessary to ascertain, by the evidence of foreign experts, the practice of the foreign courts in this difficult question of *renvoi*—a question on which there is often a conflict of opinion in the foreign country concerned, and on which the practice in any one foreign country may change from time to time, although it appears that, in two of these three cases, there was no difficulty in finding out what was the position in Italy and Germany respectively, and that it was only the ascertainment of French practice in the third case that caused difficulty.

Russell J. suggested that it would be simpler and preferable if the English rule were changed and a reference to a foreign law were deemed to be merely a reference to the internal law of the country concerned. It would indeed be simpler, but it is doubtful whether it would be more desirable, for at any rate the English practice leads to a diminution in the number of cases where there is any conflict—that is to say, in the number of cases where the result arrived at is different according as it is an English or a foreign court which is deciding, for instance, the question of the devolution of property; and the diminution of such conflicts seems to be the most important consideration.

Maugham J., in the *Askew* case, indeed, urged that the matter should be dealt with by a statute. Perhaps it is desirable that it should be, but it seems

doubtful if it would be worth while simply to lay down in a statute what is to be done in cases where there is, or may be, a *renvoi*. If any statute were to be passed, it might be well to go farther in eliminating possibilities of conflict, and to enact that, in the case of all foreigners (British subjects being left to be governed by the existing rule), the reference should be to the law of the nationality in all matters which, at present, are referred to the law of the domicil, provided that where the law of the nationality also applies the law of the domicil, the law of the domicil should be applied, and that, where the foreigner concerned is a national of a composite state containing, like the British Empire, more than one system of law, the law of his nationality should be deemed to be that which would be applied to questions relating to his personal status in the courts of that foreign country.

Maugham J. mentions a new point which it is worth while to note. He says that where, under the English rule, a matter such as, for instance, the devolution of personal property is governed by the law of the domicil, this means that the English courts will decide the matter in the same manner as the courts of the foreign country concerned would decide it, but subject to this qualification: that the manner, in which the foreign courts would decide it, is not one which the English courts must decline to adopt on the ground of public policy. He cites examples of theoretical cases of the foreign courts applying local legislation under which the estates of all deceased foreigners revert to the state, and points out that the English rule without this qualification would require the English courts to recognize and apply discriminatory and confiscatory laws against foreigners.

There is one other question of considerable importance which arises in these two cases, and that is this: what is the law of the nationality of a British subject when a foreign law requires that the law of the nationality should be applied? If the British subject had a domicil in some part of His Majesty's dominions, it would, perhaps, be clear that it was the law of that British country in which he was domiciled, but in general these cases only arise when the person is in fact domiciled in the foreign country concerned. Under the *Ross* case and the *Askew* case, the answer seems to be clear: it is the law of that part of His Majesty's dominions in which the person concerned had his domicil of origin. Of course it may happen that the individual concerned has never had a domicil in any part of His Majesty's dominions, and in such a case perhaps one would have to go back to find a domicil of origin to the latest ancestor of the person concerned who had a domicil in British territory. Language is used in the judgment of Farwell J. in the much discussed case of *In re Johnson* which might be understood to mean that in such cases the law of the nationality of any British subject must be deemed to be English law, but there is, in the *Askew* case, a valuable note by the learned editor of the Law Reports. The note is appended to the words "English law" in a summary by Maugham J. of *In re Johnson*, and reads as follows: "A compendious name for the legal result of allegiance to His Britannic Majesty. . . . There is no suggestion in the present case of any presumption that a British subject's personal law is that of England rather than that of any other part of the Empire. Such a suggestion has been made elsewhere, but, it is submitted, without foundation. F. P."

The case of *Nachimson* v. *Nachimson* (3) is of considerable legal interest and of great practical importance.

The point which the Court of Appeal (overruling Hill J.) decided is that marriages contracted in Soviet Russia according to the local law in force in 1924 are marriages of such a kind that the matrimonial jurisdiction of the English courts can be invoked in relation to them.

There was a petition for judicial separation by a party to a marriage contracted in Soviet Russia in 1924 according to the forms laid down by the laws of the U.S.S.R. Hill J. had held that he had no jurisdiction to entertain the petition.

In order that the English courts should have jurisdiction to entertain a petition for any form of relief in a matrimonial cause, it is necessary to show in the first place that there is a marriage in the sense that that institution is understood in connexion with the exercise of their matrimonial jurisdiction or, as is sometimes but quite inaccurately said (for religion has now nothing to do with the matter) "a Christian marriage". The requirements which a union must possess in order to be a marriage in this sense were laid down by Lord Penzance in 1866 in the leading case of *Hyde* v. *Hyde* in a definition which still holds the field: it must be (1) a voluntary union, (2) for life, (3) of one man and one woman to the exclusion of all others; and, to ascertain whether a marriage fulfils these essential requirements, recourse must be had to the law of the country where it was contracted in order to determine whether the parties, in marrying in the way they did, contracted a union of this kind. So far Hill J. and the Court of Appeal were in agreement.

Evidence was given by experts in Russian law, and neither Hill J. nor the Court of Appeal had any difficulty in holding that, in the case of a Soviet Russian marriage under the law in force in 1924, requirements (1) and (3) of Lord Penzance's definition were satisfied. The difference of opinion related to the requirement that the marriage must be a "union for life". The evidence was that, though under the law of the U.S.S.R. the parties to a marriage could not by agreement at the time of the marriage limit its duration or make provisions as to the conditions or manner in which it could be terminated, marriages could be terminated in the U.S.S.R. at any time by the common consent of the parties or the unilateral desire of one of them, provided that the necessary procedure of a formal nature before a registrar was fulfilled.

Hill J. thought that in these circumstances a Soviet Russian marriage could not be said to be for life, since either party could always terminate it at will, although he recognized that the requirement "union for life" did not mean indissoluble.

The Court of Appeal interpreted "union for life" as meaning a union not limited in duration, a condition the Soviet law satisfied. They held, further, that the conditions under which marriages can be dissolved in the country where a marriage takes place could not be regarded as being conditions, so to speak, incorporated in the contract of marriage by the *lex loci contractus*,[1] for the reasons that the conditions under which any given marriage may be dissolved are

(*a*) not part of the essence of the contract of marriage but incidental thereto;

[1] In the Court below Hill J., in coming to the conclusion he did, had in fact done this. It would appear, moreover, that, even if Hill J. had been right in so doing, Lawrence and Romer L. JJ. at any rate would still have held that a Soviet Russian marriage fulfilled the requirement of being a "union for life"; see note 2, p. 178.

(*b*) governed by the law of the domicil of the spouses for the time being (not necessarily the same law as the *lex loci contractus*);

(*c*) not subject to, dependent upon, or capable of alteration by the will of the parties.

Consequently, in deciding whether a marriage celebrated in a given country and according to the law of that country is a marriage within the meaning of Lord Penzance's definition, the conditions under which marriages may be dissolved in that country are not a relevant consideration to be taken into account.

The Court of Appeal in fact only followed the reasoning of certain dicta of Lord Brougham in his long speech in *Warrender* v. *Warrender*, but the decision is a useful one in clearing up decisively all doubts on one important point of Private International Law.

One other point is worth notice in connexion with this case. The respondent's main defence to this petition was that the matrimonial domicil was Russian and the marriage had been dissolved in accordance with the law of the domicil by registration at the Soviet Consulate-General in Paris. Neither Hill J. nor the Court of Appeal dealt with this point, which remains for decision unless the proceedings are allowed to drop by the parties. There is in fact no decision of the English courts which bears directly on this point, but there are certain dicta (particularly in the case of *R.* v. *Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K.B. 634)[1] to the effect that the English courts will not recognize a divorce, even if it is correct and valid according to the law of the matrimonial domicil, unless it takes the form of a decree of a court. Such a view, if good law, is likely to give rise to many difficulties in practice, and the judgment of Lawrence L.J. in this case contains at least a dictum pointing strongly to a contrary conclusion.[2] It is to be hoped that these or other proceedings will afford the means of obtaining an authoritative decision on this point also.[3]

[1] Where they *may* be the *ratio decidendi* in the case; but another explanation of this rather difficult case lies in the essential difference between the two institutions, namely, English monogamous marriage and the polygamous Mohammedan marriage of India, and the impossibility of the former being dissolved by a procedure under the law applicable to the latter.

[2] He refers ([1930] P. at p. 235) to the judgment of Hill J., who held that (in order to give the English courts jurisdiction to grant relief) the marriage must be one by which the parties are bound to one another "until death, unless the State dissolves the bond", and he (the L.J.) says ". . . but, if it be right to qualify the definition of a valid marriage by the introduction of a reference to its dissolution (which in my opinion it is not), the qualification instead of being '*unless the State dissolves the bond*' should be '*unless the bond is dissolved in the lifetime of the spouses in accordance with the law of their domicil for the time being*'." See, however, *Papadopoulos* v. *Papadopoulos*, the case which is considered next in this Note, and Lord Merrivale's second ground for rejecting the nullity decree of the Cyprus court.

[3] In cases in which the question is whether there is a marriage of a kind such as to allow the matrimonial jurisdiction of the English courts to be invoked by the parties, it is common to find the question referred to as being whether the marriage is "valid" or one "which the English court can recognize". The present case contains language of this kind, but it is apt to be misleading, since it by no means follows that the English courts must take the view that a marriage is invalid, or must treat a marriage as a nullity for all purposes, merely because it is not of a kind in respect of which they could grant the parties a divorce or judicial separation. Such a marriage *may* none the less be recognized as valid for the purposes of legitimacy of children or rights of succession

The case of *Papadopoulos* v. *Papadopoulos* (4) raises more interesting legal questions than it decides. It appears to be the law of Cyprus that no marriage, wherever celebrated, of a person who is domiciled in Cyprus and a member of the Orthodox Greek religious community will be recognized as valid unless there is a religious ceremony according to the rites of the Greek Orthodox Church. Greece and some other countries, in which religious influence is very strong in connexion with the law of marriage, have a law which is similar on this point.[1] A male member of this community married a lady in London at a registry office. The incapacity of a person under the law of his domicil to contract marriage otherwise than in a certain religious form is not of course recognized in England as any bar to a marriage in any ordinary form admitted by the local law, because this is one of the limitations on a person's capacity, like those of a monk, which English law does not recognize on the ground that they are of a kind contrary to English ideas (public policy). (*Chetti* v. *Chetti*, [1909] P. 67.)

In this case a British court in Cyprus had made an order declaring the marriage null and void. This order, however, was one made by consent of the parties and in fact was merely a judicial recognition of a settlement by agreement (an agreement which the English court held to be immoral and void as contrary to public policy) in which, in consideration of the payment in full satisfaction of a lump sum of money by the "husband", a number of claims by the "wife" were compromised as well as the question of the validity of the marriage. It was also made by a court which had, under the law of Cyprus, no jurisdiction to pronounce decrees of nullity or divorce.

The English divisional court in this case held that this order of the court of Cyprus was not a judgment *in rem* in a matter of status which must be recognized as conclusive by the English courts, Lord Merrivale basing his conclusion apparently on two alternative grounds: (1) that it was not a judgment of a court of competent jurisdiction; (2) that it was not a judgment of a court adjudicating judicially between the parties, but merely a judicial consent to a settlement between the parties out of court; and Hill J. basing his on the first of these grounds only. In connexion with the first of these two grounds of the decision, the distinction drawn so clearly by Dicey[2] should be remembered, between what he describes as a "court of competent jurisdiction" on the one hand—i.e. a court in a foreign country the jurisdiction of whose courts in general would be recognized, in respect of the subject-matter, under the English rules of private international law—and a "proper court" on the other—i.e. a court which had in fact jurisdiction in respect of the subject-matter under its own municipal law. Using Dicey's terms, the judgment of the court of Cyprus in this case was not the judgment of a "proper court", but it would appear to have been the judgment of a "court of competent jurisdiction".[3]

to property upon death, &c. In the leading case of *Hyde* v. *Hyde*, Lord Penzance was careful (with reference to a polygamous marriage) to make it clear that his decision that he could grant a divorce involved no expression of opinion on questions of this latter kind.

[1] See *Stathatos* v. *Stathatos*, [1913] P. 46, where, for this reason, a divorce was decreed in the English courts in a case where the matrimonial domicil was not English. *Query* whether this exception to the general rule about jurisdiction in divorce is any longer good law?

[2] *Conflict of Laws*, 4th ed., p. 390.

[3] The House of Lords' decision in the *Salvesen* case, [1927] A.C. 641 (see *Year Book*,

But, according to Dicey, the general rule is that the English courts, in dealing with a foreign judgment, do not concern themselves with the question whether the judgment is a judgment of a "proper court" but only with the question whether it is a judgment of a "court of competent jurisdiction".[1] Dicey himself recognizes an exception to this general rule in cases where the foreign judgment, being a judgment of a court not "a proper court", is, in the country where it was given, not merely one which is irregular though valid until set aside, but is actually a nullity, and the present case comes within the exception. Perhaps, in the cases of judgments in matters of divorce or nullity, the exception may go even farther, in view of the public interest in these matters, which restricts the freedom of the parties to choose their tribunal or to increase its jurisdiction by consent. In other cases the parties alone are interested, and the party disputing the recognition of a foreign judgment on the ground that it was not a judgment of a "proper court" exposes himself to the reply that, if his contention were correct, it is or was for him to get it set aside in the country where it was given.

If it had not been for the two objections to the Cyprus judgment which have been discussed above, this case would have probably provoked a decision on another even more interesting point. Assuming these objections had not existed, would a decree of nullity of a court of the domicil, declaring void a marriage celebrated in England according to the forms of English law on the ground that one of the parties was incapable by the law of his domicil from contracting marriage in any but a certain religious form, be recognized by the English courts? In favour of the view that it would, may be cited the *Salvesen* case and other recent decisions,[2] strongly emphasizing the pre-eminence of the law and courts of the domicil in matters of personal status:[3] on the other side, considerations of public policy and the failure of the court of the domicil to apply the well-established rule of *locus regit actum* in connexion with the formalities of marriage. If any deductions may be drawn from the remarks and dicta of the learned judges in this case, one might be tempted to conclude that Hill J. would have thought that the judgment of the court of the domicil should be recognized, but it is not possible to draw any conclusions with regard to the view of the President.

Spivack v. *Spivack* (5) is worth notice for two reasons. It deals with an application for maintenance by a wife who had been married to the Respondent in Russian Poland in 1890 by a Jewish religious ceremony. The

1928, pp. 169 and 181), recognized the jurisdiction of the courts of the domicil to make decrees of nullity in respect of defects of form of a marriage celebrated in another country, but did not deal specifically with the case where the marriage had been celebrated in England. But after the *Inverclyde* case, [1930] W.N. 258 (a case which will be noted in the next number of the *Year Book*), it would seem almost certain that the mere fact that the marriage had been celebrated in England would not be a ground for not recognizing a decision of the courts of the domicil in a nullity suit, at any rate if the foreign court recognized the ordinary rules of private international law and attempted (even if mistakenly) to decide the question on the basis of English law.

[1] *Conflict of Laws*, 4th ed., p. 390.

[2] Such as *Attorney-General for Alberta v. Cook*, 1926 A.C. 446 (*Year Book* 1927, p. 194); *Salvesen* v. *Administrator*, [1927] A.C. 641 (*Year Book* 1928, pp. 169 and 181. See note, *ibid* p. 126).

[3] If the decree of the court of the domicil was recognized, then there would be no ground for the exceptional jurisdiction in divorce exercised in *Stathatos* v. *Stathatos*—see note 1, p. 179.

Respondent disputed the validity of the marriage. The Divisional Court strongly reaffirmed the old principle (which the President said was "the lifelong practice" of the Probate and Divorce Division) that "where there is evidence of a ceremony of marriage having been gone through, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary". This is a rule which it would seem must be followed in all civil matters, and the only exception would appear to be in criminal cases (referred to and distinguished in the judgment) where, as for instance in a prosecution for bigamy, the burden of proving an original valid marriage is put strictly on the prosecution.

It is useful, therefore, to contrast this case with a recent decision of the Court of Criminal Appeal, quashing a conviction for bigamy, where the first marriage was also a Jewish religious marriage celebrated in Russian Poland in 1891, on the ground of insufficient evidence of the validity of the first marriage.[1]

The other point is this. Under Jewish religious law marriages may be dissolved at the will of the husband by delivery of a letter of divorce, and a husband may have more than one wife. But the President said in his judgment "if there is a fact conspicuous in the last two hundred years of the law of marriage of this country it is . . . that there is no doubt that a Jewish marriage is a marriage of which the Court [*sc.* in the exercise of its matrimonial jurisdiction] must take account". The fact is, of course, that Jews living in monogamous countries do not practise polygamy, though it may be that they may do so elsewhere, and the law of these countries, while recognizing Jewish religious marriages, treats them as monogamous marriages, and the Jews do not under the law of their domicil any longer retain the capacity of possessing more than one wife (nor, though the point is less material, in most of such countries of divorcing their spouses in the manner allowed by Mosaic law). This is no doubt the explanation of this apparent inconsistency, for the English courts do not exercise their matrimonial jurisdiction in respect of polygamous marriages.

It has yet, however, to be seen what the English courts will do when they have to deal with a Jewish marriage celebrated in the East or in some country where Jews still practise polygamy and where the husband is a Jew domiciled in such a country.

The case of *In Re Anziani* (6) deals with a voluntary assignment *inter vivos* of choses in action legally situated in England by an instrument executed in Italy in a form which was void in Italian law, but valid in English law, by a person domiciled in Italy. Maugham J. held that the assignment was invalid on the ground that a transaction, which is a nullity by the law of the country where it takes place owing to non-compliance with the formalities required by that law, must be regarded as a nullity everywhere. This was one of the two points which arose in the interesting case of the *Republica de Guatemala* v. *Nunez*,[2] where an assignment was executed in Guatemala by a person domiciled there in a form which was void by the law of Guatemala. On this point there was, in that case, a difference of opinion in the Court of Appeal between Scrutton and Lawrence L.JJ., though all the L.JJ. were unanimous in rejecting the claim in that case on one ground or another. On this particular point, however, Scrutton L.J. based his decision on the ground which was adopted by Maugham J. in this case, whereas Lawrence L.J. made a distinction between an assign-

[1] *R.* v. *Moscovitch* 44 T.L.R. 4 (*Year Book* 1929 at pp. 250 and 261).

[2] [1927] 1 K.B. 699. *Year Book*, 1928, pp. 171 and 183.

ment and a contract to assign. So far as contracts to assign are concerned, Lawrence L.J. was of opinion that the principle relied on by Scrutton L.J. was correct, but he thought that, in the case of an assignment (that is to say something which actually purports to transfer the property), an assignment which was in a form valid by the law of the country in which the property was situated was valid, and that there was no distinction in this respect between the transfer of movables (and Maugham J. in this case expressly said that he thought a transfer of movables in a form valid by the *lex situs* was good) and the assignment of choses in action. In the *Anziani case*, the document was an assignment if it was anything at all, and Maugham J. particularly based his judgment on a preference for the view expressed by Scrutton L.J. to that of other members of the Court of Appeal. The judgment, however, was not a considered judgment, and the case seems to have been one in which the parties really desired a speedy decision rather than the establishment of their respective contentions, and the authority may therefore not be so strong as it otherwise would have been. So far as it goes, however, it stands as an authority in favour of the view of Scrutton L.J. as against that of Lawrence L.J. in the *Guatemala* case, and in favour of the view that, in the case of choses in action, there is no distinction to be drawn between an assignment and a contract to assign. It is at any rate clear that, on this point, Maugham J. did not consider the law of the domicil of the party who executed the instrument as being relevant. In the *Guatemala* case, as in the present case, the *lex domicilii* and the *lex loci actus* being the same, Greer J. in the court below, and Bankes L.J. in the Court of Appeal, had held the instrument invalid as not being in accordance with Guatemalan law, without making it clear whether they did so by reason of the fact that the law of Guatemala was the law of the domicil or of the place in which the instrument was executed.

The decision of the Privy Council in the case of *Berthiaume* v. *Dastous* (7) is worth notice for the strong affirmation of the rule of Private International Law "*locus regit actum*" in the matter of the formalities required for the celebration of a marriage. That is to say that, so far as matters of form are concerned, if the marriage is good by the law of the place where it is celebrated, it should be good everywhere, although such form would not be permitted by the law of the domicil of either spouse, and that, if on the other hand, the form of marriage is not good by the law of the country where it is celebrated, such marriage should be invalid everywhere although the forms which the parties went through would in the countries of their domicil have been sufficient to create a valid marriage. The case actually turns on the interpretation of some Quebec statutes, but the Privy Council clearly applied the principle that the statutes should not be given a meaning contrary to this rule of Private International Law unless their language clearly required it, and they held in fact that it did not.

The cases of *Ross* v. *Ross* (8) and *Ramsay* v. *The Liverpool Royal Infirmary* (9) are both decisions of the House of Lords on the question whether a person had changed his domicil of origin by the acquisition of a new domicil in another country. In both cases it was held that he had not. In one of them Lord Buckmaster emphasized that a change of domicil was a serious matter not lightly to be assumed, since it involved a complete change of law in relation to two of the most important facts of life, marriage and the devolution of property. In the *Ross* case, the House of Lords held that declarations of intention must be

examined by considering the circumstances in which they are made, and are in any case insufficient evidence of the acquisition of a new domicil unless they are supported by conduct and action consistent with the expressed intention. In the *Ramsay* case, it was held that a continuous residence of almost forty years was not sufficient evidence of the intention to change domicil unless there were some other facts from which such an intention might be presumed. If the long uninterrupted residence was merely due to indifference and a disinclination to move, the element of intention (*animus*) was absent.

The case of the *Croxteth Hall* (10) is of interest as being a decision interpreting the British Merchant Shipping (International Labour Conventions) Act, 1925. This Act is one passed to give effect in the United Kingdom to certain conventions drawn up at a general conference of the International Labour Organization, and, in particular, to the convention concerning unemployment indemnity in case of the loss or foundering of a ship. The case is an illustration of the well-known English constitutional principle that a treaty or convention, although ratified in respect of the United Kingdom, is not itself law in this country and that, in consequence, if, in order to comply with the obligations of the convention, it is necessary to make changes in English law, an Act of Parliament must be passed. It further illustrates what is the more usual practice in this country, namely, making such changes in the law as are necessary to give effect to the convention in the form in which English statutes are usually made, instead of simply annexing the convention to a statute and leaving the courts to interpret the generally looser drafting of international conventions. In the present case, the convention was, however, annexed as a schedule to the statute as well, and it was contended by one party in the case that the language of the statute itself was ambiguous and that, in these circumstances, recourse should be had to the annexed convention, which was the *raison d'être* of the statute, in order to see which of the two possible meanings was the real intention of the legislature. In the Court of Appeal a majority rejected this contention on the ground that there was no ambiguity as to the meaning of the statute, though all three members of the court were in agreement that, if the statute had been ambiguous, it would have been possible to have recourse to the convention for the purposes of interpretation of the statute. Two of the Lords Justices, however, made some observations as to the meaning of the convention, and differed in their conclusions, Greer L.J. inclining to the view that the convention had the same meaning as the statute as the majority construed it, and Slesser L.J., who considered the language of the statute ambiguous, making use of the convention to put a different interpretation upon the statute. It may be said, however, that, if the meaning of the statute was that which the majority put upon it, and the meaning of the convention was that which Slesser L.J. apparently thought, the position would not be that full effect was not being given to the convention in this country, but only that more was being done in this country than the convention actually required.

1. *In re Ross, Ross* v. *Waterfield.* [1930] 1 Ch. 377 (Luxmoore J.).

The Plaintiff, A. G. R., who was the only child of H. J. R. and J. A. R., his wife, was born in 1862 in Malta, and was, therefore, a British subject. His father, H. J. R., had also been born in Malta in 1820 and had resided there with his parents till 1837, after which he had resided in Egypt. H. J. R. married J. A. R. in England in 1860; she was a British subject, then domiciled in England. At the date of the marriage H. J. R. was domiciled in Egypt. In 1866 H. J. R. and J. A. R. left Egypt and lived in Italy, at

Turin and later at Florence, where H. J. R. bought a house and estate in 1888 at which they resided till the death in 1902 of H. J. R. At the date of H. J. R.'s death the domicil of both H. J. R. and J. A. R. was in Italy. H. J. R. left all his property, including the real estate in Italy, by will to his wife, J. A. R., and the Plaintiff, during the lifetime of J. A. R., made no claim to any of the property.

J. A. R. continued to reside in the same house till her death in 1927. J. A. R. left (1) a will and two codicils in the English language, (2) a will in the Italian language.

The English will disposed of all the testatrix's property except the real property in Italy, and the effect of this will and the codicils was, subject to certain bequests to servants, that all the property was bequeathed to the Defendant, C. L. I. W., a niece of the testatrix, who was also made executrix.

The Italian will disposed of the real property in Italy, and the effect of this will was that A. V. A. W., a son of C. L. I. W. (and also a Defendant in the action), was made the heir to this property subject to a life interest (usufruct) in favour of the Defendant, C. L. I. W., and A. V., an Italian advocate, was made executor.

There was no dispute as to the form of either of the two wills, and the English will was proved by the Defendant, C. L. I. W., in 1928.

The Plaintiff issued the writ in the present action in 1928, and claimed:

(1) That J. A. R. died domiciled in Italy.

(2) That, in consequence, the law of her domicil (Italian law) governed the devolution of all her estate (except real property situated outside Italy).

(3) That the law of the domicil (Italian law) meant the *municipal* or internal law of Italy (i.e. the law which the Italian courts would apply to devolutions of an estate in the absence of any rule of Private International Law requiring the application of some forcign law).

(4) That, under the municipal law of Italy, the Plaintiff, as the only child of J. A. R., was entitled, notwithstanding any testamentary dispositions, to one moiety of all her property (real and personal) situated in Italy, and one moiety of all her personal property situated elsewhere, as his *legitima portio*.

Alternatively:

(1) That, if the law of the domicil means the whole law of the domicil, including the rules of Private International Law which the Italian courts would apply to the case, the Italian courts would apply the law of the deceased's nationality.

(2) That the deceased was a British subject, who married, and died the widow of, a British subject who was born in and had his domicil of origin in Malta; the law of the nationality of the deceased which the Italian courts would apply would be Maltese law, and under Maltese law the Plaintiff was entitled to onc-third of the deceased's property as his *legitima portio*.

It was contended on behalf of the Defendants:

(1) That the law of the domicil (Italian law) meant the whole law of Italy, including the rules of Private International Law which the Italian courts would apply to the case, that is to say that the English courts, in applying the law of the domicil as regards the devolution of this property, should decide the question exactly as an Italian court would have decided it, and hold entitled thereto those persons who would have been held entitled by an Italian court.

(2) That the evidence of Italian law and the practice of the Italian courts showed (a) that for the purpose of deciding the rights of succession to deceased foreigners, the Italian courts applied the law of the nationality; (b) that in applying the law of the deceased person's nationality, the Italian courts did not apply the whole of that law but only the municipal law.

(3) That the deceased, J. A. R., was a British subject, and it was necessary, therefore, to ascertain which of the various laws of the different parts of H.M. dominions must be deemed to be the law of J. A. R.'s nationality.

(4) That the Italian courts would in this case apply English law, as being the law of the country in the British Empire which was the deceased's country of origin. *Alternatively*, if it was necessary to choose one of the laws of the British Empire on the basis of domicil, the actual domicil, Italy, being excluded, J. A. R.'s domicil of origin, England, should be selected, all subsequently acquired domicils being displaced.

(5) That there was no ground for selecting the law of Malta, which was the domicil of origin of the husband of J. A. R.; J. A. R. had never been domiciled in Malta, her

husband during the marriage having been domiciled first in Egypt and subsequently in Italy. After the death of her husband, there was no ground for going back to her husband's domicil of origin.

Held:

(1) The domicil of J. A. R. at the time of her death was in Italy.

(2) The devolution of the personal property of J. A. R. was governed by Italian law, the law of the domicil.

(3) The law of the domicil (Italian law) meant the whole of the law of Italy, including the rules of Private International Law applied by the Italian courts, and in the present case the English courts must decide all questions as to the rights of the parties to succeed to the personal property of J. A. R. in the same manner as the evidence of Italian law showed that an Italian court would decide these questions.

(4) Upon the evidence of Italian law:

(a) Article 8 of the Italian Code provided that "succession either under an intestacy or under a will, whether as regards the order of succession or the measure of the rights of succession, or the intrinsic validity of the testamentary disposition, is regulated by the national law of the person whose estate is in question, and this whatever may be the nature of the property or the country in which it is situate".

Article 9 (2): "The substance and effect . . . of . . . testamentary dispositions are deemed to be governed by the national law of the testator".

(b) The expression "national law" in Articles 8 and 9 (2) was interpreted by the Italian courts as meaning the internal law of the country of which the person concerned was a national.

(c) The Italian courts would apply English law as the national law of J. A. R.

(5) There was no ground on which the Italian courts could hold Maltese law to be the national law of J. A. R., as, although on her marriage J. A. R. lost her domicil of origin and acquired the domicil of her husband and changed it as he changed his, on his death she acquired her own domicil of choice in Italy. Upon the abandonment of a domicil of choice, the domicil of origin revives, and if J. A. R. had abandoned her domicil of choice in Italy, it would have been her own domicil of origin in England which would have revived. Consequently, if the law of her nationality was to be applied, it must be such part of British law as is applicable in the country of her domicil of origin (she having no domicil in any other British territory).

(6) The devolution of the immovable property situated in Italy was governed by the *lex situs* (Italian law).

(7) The *lex situs* (Italian law) means the whole of the law of Italy, including the rules of Private International Law applied by the Italian courts.

(8) Under Italian law the devolution of immovable property situated in Italy is governed by the law of the nationality of the deceased (see Article 8 of the Code, paragraph 4 above).

(9) The law of the nationality of the deceased is regarded as meaning the internal law of the country of which the deceased was a national, and in the present case was English law.

(10) For these reasons, there being under English law no restrictions on the power of the testator to dispose by will of all her property in favour of the Defendants, the claims of the Plaintiff to any share in the estate of J. A. R. must be rejected.

2. *In re Askew. Marjoribanks* v. *Askew.* [1930] 2 Ch. 259 (Maugham J.)

In 1893 a trust fund was settled on the occasion of the marriage of J. B. A. and F. L. A. upon trust during the life of J. B. A. to apply the income for the benefit of J. B. A. and F. L. A. and their issue, and, after the death of J. B. A. and F. L. A., for the benefit of their issue.

The settlement provided that, if J. B. A. married again, he might revoke the trust as regards one-half of the said fund and appoint such part to be held upon trust after his death for the benefit of any wife who might survive him, and any child or other issue of his subsequent marriage.

There were two children of the marriage of J. B. A. and F. L. A., who were Defendants in the present proceedings. J. B. A. and F. L. A. lived apart for some time, he in Germany and she in Switzerland. In December 1909, J. B. A. began to live and cohabit with the Defendant, A. A. At some time prior to 1911 J. B. A. had acquired

a domicil in Germany. In January of that year a child, M. A., was born in Switzerland to A. A., and she was acknowledged to be the daughter of J. B. A.

J. B. A. instituted in the proper German court divorce proceedings against F. L. A., and obtained a decree which became absolute in June 1911. In April 1912, after the decree of divorce had become absolute, J. B. A. married A. A. at Berlin. In June 1913, purporting to exercise his powers under the settlement of 1893, J. B. A. revoked the trust as regards a part of the trust fund, and appointed such part to be held in trust for A. A. for her life if she should survive him, and after the death of himself and A. A. on trust for M. A. F. L. A. died in 1918, and J. B. A. died in 1929, and the Plaintiffs, who were trustees of the settlement, took out this summons in order that it should be determined whether the appointment in 1913 of part of the fund in favour of A. A. and M. A. was validly made.

Held:

(1) That A. A. was clearly a second wife within the meaning of the terms of the settlement.

(2) That the question whether M. A., who had been born before the marriage of J. B. A. and A. A. and before the first marriage of J. B. A. with F. L. A. had been dissolved, could be held to be a child of his subsequent marriage with A. A. depended on whether M. A. was legitimated by reason of the subsequent marriage of J. B. A. and A. A.

(3) That the Common Law rule with regard to legitimation is correctly stated in Dicey, *Conflict of Laws*, Rule 137 (Case I): "If both the law of the father's domicil at the time of the birth of the child and the law of the father's domicil at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium*, the child becomes or may become legitimate on the marriage of the parents".[1]

(4) That J. B. A. was, both at the time of the birth of M. A. and at the time of his marriage with A. A., domiciled in Germany and consequently the question whether M. A. must be regarded as legitimated depends on whether she was legitimated under German law (the law of the domicil).

(5) That the law of the domicil (German law) meant the whole of German law, including the rules of Private International Law applied by the German courts.

(6) (Upon evidence of German law) that (*a*) German law would apply the law of

[1] The Legitimacy Act 1926, Section 1 (2) and Section 8, provides:

"*Section 1 (2):* Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

"*Section 8:* Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognized as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law."

The judgment says it was admitted that the Act would not have the effect of legitimating M.A., in view of the fact that the marriage of J. B. A. and F. L. A. was not dissolved when M. A. was born. But (though the point was of no importance in the present case) it may be noted that it is not clear that Section 1 (2) in any way qualifies or applies to the cases where under Section 8 a person is "in England and Wales *to be recognized as having been legitimated*" by reason of the fact that the father was domiciled at the time of the marriage in a country (other than England and Wales) by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage. In the cases under Section 8, the illegitimate person is treated as having been legitimated under the law of the domicil and not as having (in the words of Section 1 (2)) been legitimated under the Act; persons legitimated under the Act are persons whose fathers at the time of the marriage are domiciled in England and Wales.

the country of which the father was a national at the time of the marriage, to determine the question whether a child born before the marriage was legitimated. [It was in this case assumed that in the case of J. B. A. the law of his nationality was English, *sc.* on the ground that his domicil of origin was English, but this point was not discussed.]

(*b*) The German court in applying English law, the law of the nationality, would apply the whole law of England, including the rules of Private International Law as interpreted by the English courts.

(*c*) In cases where, as in the present case, the German law provides that the law of the nationality is to govern a question, and the law of the nationality refers to the law of the domicil and the domicil is German, there are numerous decisions of the *Reichsgericht*, the Court of the highest instance in Germany, to the effect that the German courts should apply German municipal law.

(*d*) Under German municipal law, M. A. would be regarded as legitimated by the subsequent marriage of her parents although at the time of her birth her father was married to a woman other than her mother.

(7) That for these reasons M. A. must be regarded in England as the legitimate child of J. B. A., and the power of appointment was validly exercised in her favour.

3. *Nachimson* v. *Nachimson*. [1930] P. 85 (Hill J.) and 217 (C.A.) 46 T.L.R. 166 and 444.

This was a petition for judicial separation, on the ground of cruelty, brought by the female Petitioner, I. N., against the male Respondent, G. M. N. The parties had, on March 19, 1924, been through the formalities required by the laws of the U.S.S.R. for a marriage, at the Moscow Provincial Registration Office, Krasno Presna section, Moscow—their domicil at the time being Russian. The parties subsequently cohabited in Sweden and in England, where a child was born to them. The present petition was filed on March 9, 1929. The Respondent alleged that the marriage had been dissolved on January 29, 1929, according to the laws of the U.S.S.R. by an *ex parte* registration of dissolution, at the instance of the Respondent, at the Consulate-General of the U.S.S.R. in Paris (there being at that time no Soviet Consulate in London), and appeared under protest.

On November 11, 1929, an Order was made for the trial of the following questions before the hearing of the petition:

(1) Have the Respondent and Petitioner ever been man and wife?

(2) If yea: (*a*) were the parties domiciled in the U.S.S.R. on January 29, 1929? (*b*) was their marriage dissolved on that day?

The evidence of several experts in Russian law was given on the points of Russian law arising out of these questions. These experts were unanimous on the question of the nature of the union between the parties created by the marriage in Moscow: namely, that it was a union, presumably for life, between a man and a woman, and continued until dissolved, and that neither party could marry another person during the subsistence of the marriage; and in holding that, under the law of the U.S.S.R., such a marriage could be terminated at any time by mutual consent or the unilateral desire of one party, if the appropriate proceedings were gone through—which consisted, in case of mutual consent, merely in registration at the appropriate office; and in case of the unilateral desire of one party, in an application to the appropriate court in whose district the other party resided, the other party being summoned, or proof of the impossibility of such summons being required. Provided, however, that these formalities were fulfilled, the divorce followed as a matter of course.[1] Their evidence was conflicting on the question whether, in this case, the registration of dissolution at the Consulate-General in Paris was effective under that law to dissolve the marriage—the difference relating to the jurisdiction of the Consulate-General in respect of these parties.

Both parties contended that the nature of the union between them created such a

[1] This was under the Soviet law of 1918, which was in force at the time of the marriage in 1924. This law was modified by a subsequent law in 1927, which only required registration by one party at the proper office for the purpose of any divorce. But it was the law in force in 1924 which was alone held to be relevant for the purposes of the question dealt with in the judgments of Hill J. and the C.A.

relationship of husband and wife as to give the court jurisdiction.[1] The Respondent contended:

(*a*) that the matrimonial domicil was Russian;

(*b*) that the dissolution by registration in Paris was a valid dissolution under the laws of the U.S.S.R., and the English courts recognized any dissolution of a marriage of parties domiciled abroad which was recognized by the *lex domicilii*;

(*c*) alternatively, that if the parties were not domiciled in the U.S.S.R., the provision of the *lex loci contractus*, that the marriage could be terminated unilaterally or by common consent, was one attached to the contract of marriage, and a dissolution in accordance with it must be recognized by the law of the domicil.

The Petitioner contended:

(*a*) that the parties were now domiciled in England and that the marriage could only be dissolved by the English courts in the manner and on the grounds recognized in English law;

(*b*) that the question whether and in what manner a marriage could be dissolved was an incident of the marriage, and was not one which affected the nature of the contract; the provisions of the *lex loci contractus* on this point were immaterial;

and, alternatively, assuming a Russian domicil,

(*c*) the English courts would not recognize a dissolution which was (i) not the judgment of a court, or (ii) pronounced elsewhere than in the country of domicil; and

(*d*) in any case, the registration in Paris was not a valid dissolution of the marriage according to the laws of the U.S.S.R.

Held by Hill J.:

(1) that, though neither party desired it, it was necessary for the court *ex officio* to decide the first question first of all—as, if there was no marriage, the court had no jurisdiction over the matter alleged in the petition. The question was whether the parties were "husband" and "wife" and there was a "marriage" within the meaning of these terms in Section 21 of the Judicature Act, 1925, from which the jurisdiction of the High Court in matrimonial causes and matters was derived;

(2) that it was therefore necessary to determine what was the nature of the union by the *lex loci contractus* (U.S.S.R.), and to ascertain whether it was of such a kind that it was a "marriage" in respect of which the court had jurisdiction to grant relief in a matrimonial cause;

(3) that, in order to give the court jurisdiction, the marriage must be the (*a*) voluntary (*b*) union for life (*c*) of one man and one woman to the exclusion of all others (*Hyde* v. *Hyde* L.R. 1 P. & M. 130);

(4) that a marriage contracted in the U.S.S.R. was a union which the parties, or one party, could dissolve at will by complying with the forms prescribed by law, and though the requirement of English law that the marriage must be "for life" does not exclude unions dissoluble by an Act of State, but only means indissoluble by the acts of the parties during life, that requirement was not fulfilled by a marriage under which the parties were bound to one another until death or until one (or both) desired a dissolution and procured a ministerial Act of State which gives legal force to the desire; and, in consequence, a marriage contracted under the laws of the U.S.S.R. was not a "marriage" within the meaning attached to that word in the Statute from which the court derived its jurisdiction, and there was no jurisdiction to give the relief prayed for in this case.

On appeal by the Petitioner against the judgment of Hill J., the Court of Appeal (Lord Hanworth M.R., Lawrence L.J., and Romer L.J.) unanimously reversed his decision:

The C.A. agreed with the judgment of Hill J. on the points summarized above under the numbers (1), (2), and (3), but differed from him with regard to (4) and held that:

(1) the dissolubility or indissolubility of the marriage and the conditions under which it could be dissolved, is a question relating to the rights of the parties under, or flowing from, the marriage and is a matter which was an incident of and not part of the essence of the contract of marriage: these conditions are not conditions incorporated in and forming part of the marriage contract under the *lex loci contractus* of the marriage,

[1] Before the C.A., however, Counsel for the Respondent argued in support of the decision of Hill J.

but are conditions of defeasance governed by the law of the domicil of the spouses and not dependent on any agreement between them or capable of being altered by the parties (following on this point the dicta of Lord Brougham in *Warrender* v. *Warrender*);[1]

(2) consequently in determining whether there was a marriage within the meaning of section 21 of the Judicature Act 1925 so as to give the Court jurisdiction to entertain a petition for judicial separation, and in ascertaining the essential nature of the union under the *lex loci contractus* for this purpose, the conditions under which marriages could be dissolved under the *lex loci contractus* of this marriage were immaterial, since they did not form part of the essence of the matter, and it is the law of the matrimonial domicil of the parties and not the *lex loci contractus* which governs all questions relating to the dissolution of the marriage;

(3) that in considering, by reference to the *lex loci contractus*, whether the essential nature of the union so contracted fulfilled the conditions necessary to give the Court jurisdiction, and applying for this purpose the requirements of the definition of Lord Penzance in *Hyde* v. *Hyde* (see point No. 3 above), and in dealing with the requirement (*b*) that it should be a "union for life", the test was whether the union was or was not one of limited duration; and, if it was of unlimited duration, and continued for life, unless dissolved in accordance with the law of the domicil of the spouses, it satisfied the condition of this requirement and was a "union for life";

(4) upon the evidence of the experts, it was not possible under the law of the U.S.S.R. for parties by agreement to make provisions relating to the duration of the marriage or relating to the conditions under which it could be dissolved, and marriages in Russia were of unlimited duration and continued for life unless dissolved;

(5) consequently, a marriage celebrated in the territory of the U.S.S.R., in accordance with the law in force in that territory in 1924, was a marriage within the meaning of that term in section 21 of the Judicature Act 1925 and fulfilled the requirements necessary to enable the matrimonial jurisdiction of the English courts to be invoked by the parties to it.

4. *Papadopoulos* v. *Papadopoulos*. [1930] P. 55. (Div. Ct.)

The Appellant, a native of Cyprus and domiciled there, married the Respondent in London at a registry office in 1912. He then returned to Cyprus, where the Respondent followed him and, since he refused to recognize her as his wife, took proceedings against him in the District Court of Nicosia (1) for a declaration of the validity of the marriage and maintenance, and, alternatively, (2) for damages for breach of promise of marriage. These proceedings ended in a compromise between the parties and, as a result, in May 1914, an order was made by the District Court by consent, under which (*a*) it was recited "the Plaintiff and Defendant declaring that the marriage . . . is void *ab initio* as contrary to the law of the domicil of both parties as regards the essential conditions of marriage,[2] it is hereby declared null and void"; (*b*) the Respondent was to make no further claim against the Appellant in respect of the matters which formed the subject of the proceedings, or otherwise; (*c*) the Appellant was to pay £380 in full satisfaction of all claims. The Appellant returned to England in 1914, where he continued to reside except for short visits to Cyprus.

In May 1919 the Appellant married another woman in Cyprus, according to the rites of the Orthodox Church, a form of marriage which was the only valid form by the law of Cyprus for Orthodox Greek Christians, to which community the Appellant belonged.

In 1929 the Respondent followed the Appellant to England. By a letter from her solicitor in March of that year, she demanded the payment of maintenance and, on the

[1] 2 Cl. and F. 488 at p. 532.

[2] The report of the case indicates (and *The Times Law Reports* state that evidence was given by a member of the Cypriote bar to this effect) that the marriage in 1912 would have been invalid according to the law of Cyprus by reason of the fact that the law of Cyprus recognized no form of marriage for Orthodox Greek Christians unless celebrated by a priest of the Greek Orthodox Church, and that, in the case of persons domiciled in Cyprus, the courts of Cyprus applied the law of the domicil as regards all questions (including the form) relating to the validity of marriages wherever such marriages were celebrated.

Appellant failing to comply, took proceedings against him in a metropolitan police court for maintenance. The magistrate held (1) that the judgment of a foreign court, impugning the validity of a marriage celebrated in England on the ground of absence of forms required by the law of the domicil, could not be recognized in an English court; (2) that, there being a form of marriage which the court must recognize as valid, the court of summary jurisdiction had jurisdiction to make an order if there was in England a failure by a husband to maintain his wife; and (3) that there was such a a failure on the part of the Appellant as from the date of the demand of the Respondent by a letter from her solicitor for payment of maintenance. On these grounds he made an order for the payment of maintenance by the Appellant as from March 1929. From this order the Appellant now appealed.

It was contended on behalf of the Appellant:

(1) That, the marriage having been declared null and void by a court of the domicil (a court of competent jurisdiction), the question of the validity of the marriage was *res judicata* and the judgment was a judgment *in rem* in a matter of status, which must be recognized everywhere;

(2) That, even if the judgment of the Court of Nicosia was not to be regarded as a judgment *in rem* as regards the validity of the marriage and need not be recognized as conclusive on this issue, it was a judgment *inter partes* on the matter of maintenance, and finally settled all claims on this head;

(3) That the Respondent was estopped by the terms of the agreement between her and the Appellant, which the order of the Nicosia court embodied, from making further claims on the Appellant based on her rights as his wife;

(4) That the Respondent was estopped by the acceptance by her of £380 in full settlement of all her claims, including her claims to maintenance:

and on behalf of the Respondent:

(1) That the judgment of the court of Cyprus as regards the validity of the marriage should not be recognized:

(*a*) on the grounds that it was obtained by collusion or that it was a judgment by consent, and judgments *in rem* in matters of status, based on consent, are not to be recognized (*Jenkins* v. *Robertson*);

(*b*) on the ground that it was based on a complete disregard of the principles of Private International Law (as shown in the decision of the Privy Council in *Berthiaume* v. *Dastous*) in that, in deciding a question as to the validity, from the point of view of form, of a marriage celebrated in England, no investigation of the law of England (the *lex loci celebrationis*) was made, but the court applied and regarded only the law of the domicil;

(2) That the two parts of the judgment (the declaration of nullity and the order for the payment of £380) were not severable;

(3) That the agreement between the parties to treat their marriage as invalid was an agreement which was contrary to public policy and void.

Attention was called by the court to the Cyprus Order in Council and Ordinance, under which it appeared that the Court of Nicosia had no jurisdiction in respect of dissolution or nullity of marriage. Upon this point, it was contended for the Appellant that, although the Court at Nicosia had no jurisdiction to make a decree of nullity, it had jurisdiction as regards orders for maintenance, and his second contention (set out above) was unaffected.

Held by Lord Merrivale P.:

(1) That the incapacity of the Appellant under the law of his domicil to marry otherwise than by the rites of the Greek Orthodox Church was not an incapacity which the law of England recognized and was no bar to his marriage in England at a registry office (*Chetti* v. *Chetti*);

(2) That a foreign judgment may be relied upon as *res judicata* and as a bar to a subsequent suit in this country if the foreign tribunal was one of competent jurisdiction and the parties were regularly brought before the foreign tribunal and the tribunal has adjudged between them (*Richardo* v. *Garcias*);

(3) That a foreign decree of nullity is open to examination here in order to ascertain if it is one which must be recognized as conclusive (*Ogden* v. *Ogden*);

(4) That the judgment of the Court of Nicosia in this case, declaring the marriage invalid, was a judgment by a court of His Majesty the King which had, under the law

of Cyprus, no jurisdiction to make any decree of nullity. Its jurisdiction in matrimonial matters could not be enlarged by consent;

(5) That the judgment of the Court of Nicosia was not based upon an adjudication between the parties, and could not be regarded as anything more than a judicial recognition of a compact made between the parties that this marriage should be treated by them as a nullity in consideration of the Respondent receiving £380;

(6) That, for reasons given in (4) and (5) above, the judgment of the Court of Nicosia could not be regarded (*a*) as a judgment *in rem* in a matter of status, or (*b*) as a judgment of a court of competent jurisdiction to determine the validity of the marriage;

(7) That an agreement between the parties to treat their marriage as null and void, evidenced by the judgment of the Court of Nicosia, was contrary to public policy and void;

(8) That it was not possible to sever the two parts of the agreement, i.e. the agreement to treat the marriage as void and the agreement to accept a lump sum of money in satisfaction of all claims by the Respondent arising out of her rights as a wife;

(9) That, for the reasons given above, the appeal should be dismissed.

Held by Hill J.:

(1) That the Respondent must be regarded as the wife of the Appellant unless the marriage in 1912 had been dissolved or declared null and void by a court of competent jurisdiction;

(2) That the Court of Nicosia was not a court of competent jurisdiction to declare the marriage a nullity;

(3) That the Respondent must be held to be the wife of the Appellant and the magistrate was right in making an order for maintenance if there was a wilful neglect (i.e. failure to fulfil a duty) on the part of the Appellant to maintain his wife;

(4) That, *prima facie*, there was such a failure as from March 1929, when the Respondent first claimed maintenance, and the onus was on the Appellant to prove a lawful excuse for non-payment of maintenance;

(5) That a subsisting binding contract performed and not repudiated by the Appellant, under which the Respondent should not claim maintenance otherwise than as provided in the contract, or a judgment of a court of competent jurisdiction in proceedings between the parties determining the rights of the wife as to maintenance and fulfilled by the Appellant, would constitute such a lawful excuse;

(6) That the Court of Nicosia made an order for the payment of £380 on the footing that the Respondent was not the wife of the Appellant; that it had no jurisdiction to make a decree for maintenance consequential on a decree of nullity; that it did not purport to make any decree of judicial separation or restitution of conjugal rights, and, without such a precedent decree, it could not make any order for maintenance; and that the order of the Court of Nicosia was not a judgment of a court of competent jurisdiction determining the rights of the Respondent to maintenance;

(7) That the provision of the agreement between the parties, evidenced in the judgment by consent, under which the Appellant paid the Respondent £380, was inseparable from the provision that their marriage should be regarded as a nullity, which was unlawful and void, and consequently the whole agreement was unlawful and not binding;

(8) That, for these reasons, the appeal failed.

5. *Spivack* v. *Spivack*. [1930] W.N. 46. 46 T.L.R. 243. Divisional Court. (Lord Merrivale P. and Bateson J.)

This was an appeal brought before a Divisional Court by the Appellant, George Spivack, against an Order of the Stipendiary Magistrate of Leeds whereby he was found to have deserted the Respondent, his wife, and ordered to pay a weekly sum towards her maintenance. The Appellant appealed on the grounds that there had never been a valid legal marriage between him and the Respondent.

The facts were that in 1890, in what was then Russian Poland, a Jewish ceremony of marriage took place between the parties, who were then both under 21 years of age, and they lived together in the house of the Respondent's father, and three children were born. The Appellant came to England in 1895, leaving the Respondent in Poland, but for a number of years he sent her sums of money. Communication between them then ceased, and in 1913, in England, the Appellant went through a ceremony of marriage with another woman. In 1929 the Respondent traced the Appellant's whereabouts,

came to England, and took proceedings against him and obtained the Order against which the Appellant now appealed.

The Appellant contended *inter alia*[1] that there was no evidence of a lawful marriage in 1890 or that the ceremony alleged by the Respondent was a valid celebration of marriage, either by Jewish law or the law in force in Russian Poland. Before the Divisional Court evidence was given by a person who was Russian Consul in London under the Imperial régime, to the effect that a document produced by the Respondent was a certificate of marriage duly registered in accordance with the local law, and would have been recognized as a certificate of a valid marriage by the authorities of the former régime in Russia.

Lord Merrivale P. (in whose judgment Bateson J. concurred), in dismissing the appeal, held (*a*) that the certificate produced was evidence of a marriage valid by the *lex loci*; (*b*) that, even in the absence of such a certificate and of the evidence of the former Russian Consul, the Court would have presumed that a marriage existed, on the evidence of the Respondent that a Jewish religious ceremony had taken place, followed by cohabitation, on the principle set out in Halsbury's *Laws of England*, Husband and Wife, Part 2, Marriages, Paragraph 604: "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary". This, he said, was the lifelong practice in the Division, and he quoted the contentions of Mr. Bethell, afterwards Lord Westbury, before the House of Lords in *Piers* v. *Piers*, 2. H.L.C. 331, and the maxim "*semper praesumitur pro matrimonio*".

He distinguished the practice of the Probate and Divorce Division in this matter from that of the criminal courts in bigamy trials, as evidenced in cases such as *R.* v. *Naquib*, [1917] 1 K.B.D. 362, where strict affirmative proof of the validity according to the law of the *lex loci* is required of every foreign marriage.

In cases such as the present before the Probate and Divorce Division, the burden of impeaching the marriage lay on the party impeaching it.

6. *In re Anziani, Herbert* v. *Christopherson*.[2] [1930] 1 Ch. 407 (Maugham J.)

C. H. F. A. was by birth an Italian. She first married a British subject and after his death married G. A., an Italian subject, in 1900. At the time of her second marriage

[1] The Appellant also argued that the Jewish marriage was dissoluble at any time at the will of one of the parties by the delivery of a letter of divorce, and that therefore, on the authority of the judgment of Hill J. in the case of *Nachimson* v. *Nachimson*, the marriage was not of the kind which came within the matrimonial jurisdiction of the English courts. That judgment has now been reversed (see case No. 3 above), but Lord Merrivale P. (speaking before the delivery of the judgment of the Court of Appeal) said: '. . . if there is a fact conspicuous in the developments in the last two hundred years of the law of marriage in this country, it is that the legislature and the Courts have known all the time of Jewish marriage; that the legislature has put Jewish marriages outside of the ambit of its enactments providing for the legality of the ceremony of marriage in this country and has left them where they stood before the various Marriage Acts, and has merely required by an enactment in the course of the last century that there shall be a representative of a registry present who shall see that the marriage is registered. The legislature has provided in respect of Jewish marriages in a mode which leaves their validity beyond all question, and I should have thought unimpeachable and unassailable. In the Ecclesiastical Courts in this jurisdiction the subject has arisen and nobody until now has ever suggested in my hearing any doubt as to whether a Jewish marriage was a marriage of which the Court must take account.'

[2] The facts of this case are extremely complicated and not easy to follow from the report. An attempt has been made to state them so far as they are relevant to the point of Private International Law involved. The report of the evidence of the Italian expert on Italian law is not entirely clear on some points, and the judgment was not a considered one, but was delivered orally only. For these reasons, the writer is a little uncertain whether this case is here summarized quite correctly.

certain settlements were executed. These settlements related to the proceeds of the sale of certain real estate in England which was to be sold, and to certain investments and money, and under the settlements C. H. F. A. had a power of appointment by deed or will in respect of certain sums. The settlements were in English and in the English form, and there were trustees who were persons in England. In 1906 C. H. F. A. made, by deed, an appointment of a certain sum in favour of herself. In 1912 C. H. F. A. made, by deed, a further appointment of certain further sums in favour of herself, her heirs, executors and assigns.

In 1927 C. H. F. A. executed a further document (called an appointment and assignment) which was signed as a deed in the presence of two witnesses, and in which it was declared that it was intended to operate not merely as an assignment or transfer *inter vivos*, but also as regards the property with which it dealt as the last will and testament of C. H. F. A.

The document of 1927 assigned to the Plaintiffs in this action, who were two persons resident in London, as trustees, the property which C. H. F. A. had, by the deeds of 1906 and 1912, appointed in favour of herself, and the Plaintiffs, as trustees, were to realize the said property and out of the proceeds (1) to pay all debts owing by C. H. F. A. in the United Kingdom, and certain duties; (2) to pay certain legacies bequeathed by C. H. F. A. in the same document; (3) to invest the balance and hold it upon trust for the husband of C. H. F. A.; (4) subject to the trust in (3), to pay further legacies, and (5) to hold the residue upon trust for D. (one of the Plaintiff trustees) for his own use absolutely.

Power was reserved to C. H. F. A. under the document of 1927 to revoke or vary the trusts and dispositions therein made.

In 1929 C. H. F. A. died, and, in that year, letters of administration were granted to the Plaintiffs, with the document of 1927 annexed as a will.

C. H. F. A. was, in 1912 and continuously thereafter till the date of her death, domiciled in Italy. Her heirs, according to Italian law, were her husband and a brother and sister, who were made Defendants in this action, which was instituted by a summons taken out by the Plaintiffs to ascertain whether the document of 1927 operated as a valid and effective assignment of the property with which it dealt to the Plaintiffs.

Upon the evidence of Italian law it appeared:

(1) That the document of 1927 would be regarded as an assignment *inter vivos* of a voluntary character;

(2) that C. H. F. A. had full capacity to dispose of the property by assignment *inter vivos*;

(3) that, (*a*) by reason of the power of revocation reserved in it, the document was not a donation *inter vivos* by Italian law: (*b*) as a donation it would not become binding on the donor or take effect until it had been accepted by the donee (and there was no evidence that the Plaintiffs had accepted the donation during the lifetime of C. H. F. A.);

(4) that the document of 1927 did not comply with the formalities required by the law of Italy for a voluntary assignment of property *inter vivos* (which required such an assignment to be drawn up by a notary or other public officer and to be made a public act) and would, by reason of its failure to comply with these formalities, be void either as a donation (even if it could otherwise be held to be a donation) or as any other kind of voluntary assignment *inter vivos*;

(5) that the requirement of Italian law, that a voluntary assignment of property *inter vivos* should be effected by an instrument in the nature of a public act, was regarded as an essential element of the transaction governed by considerations of public policy, and failure to comply with it rendered the instrument wholly void in Italian law.

(Under Italian law, C. H. F. A. would not be capable of disposing by any testamentary disposition of more than one half of her property to persons other than her legal heirs.)

It was contended on behalf of the Plaintiffs:

(1) That the document of 1927 was in the form of, and intended to operate as, a deed, and the fact that the document was not intended to operate till the death of C. H. F. A. did not prevent it from operating as a deed;

(2) that the document was an assignment *inter vivos* and took effect immediately;

(3) that, though it did not, in the matter of form, satisfy the requirements of Italian law (the *lex loci actus*), yet it was nevertheless valid as an assignment of the property situated in England, since it was in a form valid by English law, and (*a*) in the case of

such portion of the property as consisted in immovables in England, English law governed the matter exclusively, and (*b*) in the case of the remainder of the property, which consisted in investments and other choses in action whose local situation must be deemed to be in England, a transfer of choses in action in a form which is good under the law of the country where they are situated is valid.

It was contended on behalf of the Defendants:

(1) That the document of 1927, being only intended to take effect after the death of C. H. F. A., must be regarded as being purely testamentary;

(2) that, as a testamentary document, it was invalid so far as it disposed of property other than real property situated in England, on the grounds that (*a*) it was not in a form recognized as valid by the law of the testator's domicil (Italy); and (*b*) it disposed of property in excess of the portion of which the testator was capable of disposing under the law of the domicil;

(3) that, if it was to be regarded as an assignment *inter vivos*, it was invalid in that it was in a form which was invalid and contrary to public policy under the law of the *lex loci actus*.

Held:

(1) That the document of 1927 must be held to be partly testamentary and partly non-testamentary;

(2) that, in so far as it dealt with immovables situated in England, it was valid, being in a form recognized by English law;

(3) that, in so far as it dealt with other property, which consisted in choses in action situated in England, it was invalid as an assignment[1] *inter vivos* on the ground that it was executed in Italy in a form which rendered it a nullity by the *lex loci actus*.

7. *Berthiaume* v. *Dastous*. [1930] A.C. 79 (P.C.)

D., then a girl of 17 years of age, a British subject domiciled in the province of Quebec in Canada, met in the year 1913, in the course of a visit to France, B., also a British subject domiciled in Quebec, but then resident in Paris, and the parties agreed to marry. Both parties were of the Roman Catholic faith. The parties having been informed by the Roman Catholic priest of the parish in which B. was resident that he would perform a religious ceremony of marriage provided that the necessary civil formalities were first fulfilled, B. took D. to the British Consulate, where, after the signature of certain papers, a certificate was issued. The certificate was in fact only a notice of marriage, but it was taken to the Roman Catholic priest, and the latter, carelessly omitting to notice that it was not a certificate of marriage but only a notice of marriage, performed a religious ceremony of marriage.

The parties lived in France as husband and wife till 1926, when D., discovering that B. had been guilty of infidelity, applied to the Court of Paris for a divorce.

Under the law of France, the only legal form of marriage is a civil marriage, and a purely religious marriage is a nullity (and the priest had exposed himself to penalties for performing the religious ceremony without having first obtained the production of a certificate of civil marriage), but under certain conditions a party who has in good faith contracted an invalid marriage is entitled to a declaration of civil effects in his favour.

The French courts rejected D.'s application for divorce on the ground that there was no valid marriage. A subsequent application to the French court by D. for a declaration of civil effects was dismissed on an objection by B. to the jurisdiction on the ground that he had retained his Canadian domicil.

D. then applied to the courts of Quebec for (*a*) a declaration that there was a valid marriage between her and B. under the law of Quebec; a decree of separation; a dissolution of the community of property between the spouses, and for judgment for alimony;

alternatively for:

(*b*) a declaration that the marriage was a putative marriage entered into by D. in good faith and, therefore, under Articles 163 and 164 of the Civil Code of Quebec

[1] And *sc.* invalid also as a testamentary instrument, on the ground that it was in a form not recognized by the law of the testator's domicil.

produced civil effects in favour of D., and that D. was entitled to alimony and a dissolution of the community of goods.

The Civil Code of Quebec contains (*inter alia*) the following provisions:

Article 129. All priests, rectors, ministers, and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage.

Article 135. A marriage solemnized out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnized according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law.

Article 156. Every marriage which has not been contracted openly nor solemnized before a competent officer may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances.

Article 163. A marriage, although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.

Article 164. If good faith exists on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage.

It was contended on behalf of D. that, under the concluding words of Article 156, the courts of Quebec had a discretion to declare valid a marriage which was invalid on the ground that it had not been performed by a competent officer, and that this article applied to marriages celebrated abroad as well as to marriages celebrated in Lower Canada, and that Article 135 was not exclusive as regards marriages celebrated abroad and did not prevent Article 156 from applying to such marriages.

It was contended on behalf of B. that:

(i) Article 156 gave no jurisdiction to declare valid marriages which were invalid, and the concluding words only gave power to award compensation or damages or other similar relief.

(ii) Article 156 did not apply to marriages celebrated outside Lower Canada; and with regard to marriages celebrated outside Lower Canada, Article 135, which was in accordance with the well-settled principles of private international law, was exclusive. According to those principles a marriage which, through defects of form, was a nullity in the country in which it was celebrated, was a nullity everywhere.

(iii) D. was not entitled to a declaration of civil effects under Articles 163 or 164, on the ground that she could not have believed that she had gone through a valid marriage in France and had not, therefore, acted in good faith; *alternatively*, Article 164 only gave jurisdiction to grant such declaration up to the moment when the marriage was declared null, and consequently D. could not claim alimony after the date of the present proceedings.

Held by Loranger J. that, though the marriage was void according to the law of France, he had a discretion under Article 156 to declare it valid, and in the circumstances of the case he should exercise that discretion.

On appeal to the Court of King's Bench, the appeal was dismissed by a majority of four judges to one.

On appeal to the Privy Council, the Board, in a judgment delivered by Lord Dunedin, held (reversing the decision of the Court of King's Bench) that:

(1) It was a well-settled rule of private international law that, as regards the forms of marriage, *locus regit actum*; if the form of marriage was good by the laws of the country where the marriage was celebrated, such form was good everywhere, whether such a form would or would not be a valid form of marriage in the country of the domicil of one or other of the spouses; if the form of marriage was void in the country where it was celebrated, the marriage was invalid everywhere, whether or not the form would have been a valid form of marriage if gone through in the country where either of the parties was domiciled.

(2) The marriage of B. and D. in France was a nullity under French law, and, according to the above-stated rule of private international law, should be invalid in Quebec also unless there was in force in Quebec any positive statute law to the contrary.

(3) Article 129 of the Civil Code of Quebec applied to marriages celebrated in Lower Canada only, and did not apply to this marriage.

(4) Article 156 applied only to marriages celebrated in Lower Canada; the words "competent officers", which could only mean competent officers under the law of Lower Canada, showing that this must be the case. This article did not apply to marriages celebrated elsewhere, and Article 135 laid down the only rule to be applied in the case of marriages celebrated abroad.

(5) There was, therefore, under the law of Quebec no statutory provision preventing the application of the well-established international rule, and no discretionary jurisdiction was given to the Quebec courts to declare the marriage between B. and D. valid.

(6) The marriage had been entered into by D. in good faith, and D. was entitled under Article 164 to a declaration that the marriage produced civil effects so far as D. was concerned.

(7) It was impossible to construe Article 164 as limiting the declaration of civil effects up to the date when the marriage was found to be null. It was only then that such a declaration was needed.

(8) The civil effects covered by such a declaration were all civil rights resulting from a marriage, which were not inconsistent with the non-existence of a real marriage. Alimony was such a right, and D. was entitled to a decree for alimony. There was no necessity for a declaration dissolving the community of goods, since, in the absence of a marriage, no community of goods existed.

(9) The case should be remitted to the Superior Court of Quebec to deal with the civil effects of the marriage on the basis that it had been found to be null but putative.

8. *Ross* v. *Ross*. [1930] A.C. 1. (H.L.)

Lady R. brought in 1923 an action for divorce in the Scottish courts against her husband, Sir C. R., on the ground of his adultery with Mrs. D., an American lady. Sir C. R. disputed the jurisdiction of the Scottish courts on the ground that, at the time when the action was brought, he had acquired a domicil in the United States; he also denied the charge of adultery.

Sir C. R. was born in Scotland in 1872, and in 1883 succeeded to an estate there. He lived until 1895 mainly in Scotland. In that year he went to the United States and then to Canada to revive the family fortunes. He married Lady R., a United States citizen by birth, in the United States in 1901. He moved to Canada in 1902 and established a successful arms manufacturing business in Quebec, where he and Lady R. lived, with occasional visits to the United States and to England, till 1917, when he sold his business. He then stayed a year in Washington as an expert adviser on munitions, and later for a time in Great Britain, having bought a house in London. From 1919 till the bringing of the action he had a flat in New York. In 1919 and 1920, in letters, he referred to his estate in Scotland as his real home, and in certain legal proceedings, where he had to state his residence, he gave the address in Scotland, and in an affidavit made in 1920 he said "I am a domiciled Scotsman". In December 1920 he was advised that his position as regards taxation would be improved if he could establish that he was resident and domiciled in the United States. In 1922 he was spending an increasing amount of time in his house on his Scottish estate, and he wrote to his wife in November, referring to the house as his home. The flat in New York was not regarded by him as his home and was not a suitable residence for himself and his wife, but he made statements in documents and verbally to business people of his intention to live permanently in New York, though never to his wife or to personal friends.

In 1923 he established for income tax purposes that he was a resident alien in the United States, and in January 1924, after the institution of the action, he applied for naturalization in the United States.

The Lord Ordinary held that Sir C. R. had acquired a domicil in the United States and that the Scottish courts had no jurisdiction to receive the petition. The First Division of the Court of Session reversed the decision of the Lord Ordinary and held that Sir C. R. had failed to establish that he had acquired a domicil in the United States, and remitted the case to the Lord Ordinary for hearing on the merits.

In 1927 the Lord Ordinary held that the charge of adultery was not proved. On appeal to the First Division, Lady R. obtained leave to amend her record and lead additional evidence of adultery, and the First Division held Sir C. R. guilty of adultery and granted a decree of divorce.

Sir C. R. appealed to the House of Lords against—

(1) the decision that he had failed to establish that he had acquired a domicil in the United States;

(2) the granting of leave to Lady R. to lead additional evidence of adultery;

(3) the decision that he had been guilty of adultery.

Held by the House of Lords—

(1) (affirming the decision of the First Division) that Sir C. R., who had a Scottish domicil of origin, had not proved that he had acquired a domicil of choice in the United States, and therefore must be held to be still domiciled in Scotland;

(2) (reversing by a majority the decision of the First Division) that he had not been proved guilty of adultery.

Lord Buckmaster said (p. 6), with regard to the declarations made by Sir C. R. that he intended to live permanently in New York, that "Declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must be fortified and carried into effect by conduct and action consistent with the declared expression. So regarded, the evidence of declared intention (in this case) fails to satisfy and is not established by proved facts."

9. *Ramsay* v. *The Liverpool Royal Infirmary and others.* [1930] A.C. 588.

G. B. was born in Glasgow in 1845 and had a Scottish domicil of origin. He worked as a commercial traveller in Glasgow for some years, but after 1882 he ceased to do any work. He resided in his father's house in Glasgow till his father died in 1884, and thereafter also in Glasgow with his mother and sisters. About the year 1890 he went to Liverpool. His brother, A., and sister, I., were already settled in Liverpool, and G. B.'s only means of subsistence was an allowance he received from A. He lived in the same lodgings there for over 20 years, during which period he only left Liverpool once. About 1914, after the death of his brother, A., and of another sister, he moved into a house in Liverpool, where they had been living, and his sister I. joined him there. His sister I. had desired to go to Glasgow, but G. B. refused to go there, declaring he did not wish to set foot in Glasgow again. He remained living in this house till his death there in 1927.

G. B., who, on the death of his brother and his sister I., had succeeded to some property, left a holograph will, unattested, a form of will which was valid under Scottish law but invalid in English law. He often described himself as a Glasgow man during his life and did so in his will, but arranged for his burial in Liverpool. Under the rules of Private International Law, recognized by both the Scottish and the English courts, a will is valid as regards form (*inter alia*) if executed in a form recognized by the law of the testator's domicil. If G. B. died domiciled in Scotland, the will was valid; if he died domiciled in England, the will was invalid. Under the will, the Liverpool Royal Infirmary and certain Glasgow infirmaries (the Respondents before the House of Lords) were the residuary legatees, and the residuary legatees issued a summons in the Scottish courts against I. R. (the Appellant), who was the next of kin of G. B. and a daughter of his sister I., for a declaration that G. B. died domiciled in Scotland. The Lord Ordinary granted the declaration and, on appeal to the First Division, this decision was affirmed.

The Appellant now appealed to the House of Lords. The House of Lords unanimously dismissed the appeal, on the grounds:

(1) (Per Lord Buckmaster and Lord Thankerton—in whose judgment Lord Dunedin concurred) that the burden of proof to show abandonment by G. B. of his Scottish domicil of origin and the acquisition of a domicil of choice in England *animo et facto* was upon the Appellant;

(2) (per Lord Buckmaster) that a change of domicil is a serious matter not lightly to be assumed, since it involves a complete change of law in relation to two of the most important facts of life—marriage and the devolution of property;

(3) (per Lord Buckmaster) that, though it is possible to infer the intention (*animus*) to change a domicil from the facts of the conduct of a person without its being essential to show any declaration of such intention, and though a long continued residence may, in certain circumstances, be sufficient evidence, the evidence in this case was insufficient to show any intention on the part of G. B. to change his domicil, seeing that G. B. had

no attachments to Liverpool other than the presence of his brother and sisters there, and his continued residence there after their death appeared to be due to lack of initiative and the disinclination of an elderly man to change his mode of life. An intention to change a domicil of origin "is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years" (*Winans* v. *Attorney-General*);[1]

(4) (per Lord Thankerton) that mere length of residence, even if the person has no other residence, by itself is insufficient evidence from which to infer the *animus* to change a domicil; but the quality of the residence (such as the purchase of a house or an estate) may afford the necessary evidence of *animus*.

10. *The "Croxteth Hall"*. [1930] P. 20. (Lord Merrivale P.) and [1930] P. 197. (C.A.) *The "Celtic"*.

The Croxteth Hall.

J. M. was a quartermaster on the s.s. *Croxteth Hall*, which was wrecked off Flushing on the 27th February 1929. He claimed from the owners of the vessel loss of wages and subsistence allowance for two months as from the 27th February 1929, under section 1 (1) of the Merchant Shipping (International Labour Conventions) Act, 1925, which provides: "Where, by reason of the wreck of a ship on which a seaman is employed, his service terminates before the date contemplated in the agreement, he shall . . . be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date" unless (sub-section 2) "the owner shows that the unemployment was not due to the wreck or loss of the ship" or that, in respect of any day "the seaman was able to obtain suitable employment on that day". This Act was passed to give effect in the United Kingdom to a Draft Convention drawn up by the General Conference of the International Labour Organization at Genoa on the 9th July 1920.

The relevant article of the Convention reads:

Article 2.

"In every case of loss or foundering of any vessel, the owner or person to whom the seaman has contracted for service on board the vessel shall pay to each seaman employed therein an indemnity against unemployment resulting from such loss or foundering. The indemnity shall be paid for the days during which the seaman remains unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages."

The Convention was annexed as a Schedule to the Act.

The Plaintiff had been brought back after the wreck at the owners' expense to Liverpool, near to which his home was situated, on the 4th March and been paid wages up to the 6th March. He had tried and failed to secure other similar employment.

The owners of the *Croxteth Hall* contended:

(1) That the *Croxteth Hall*, if she had not been wrecked, would have arrived at Middlesborough on the 10th March 1929, and J. M.'s agreement of service would have terminated on that date, and he had been paid wages up to the 6th March and payment up to the 10th March had been tendered;

(2) that, under the Act, the Plaintiff was only entitled to receive an indemnity against unemployment resulting from the wreck of the vessel, and could not claim any amount in excess of what he would have earned up to the date when his employment under his agreement would have terminated. This contention was supported (*a*) upon the use of the word "indemnity" in the preamble of the Act, (*b*) upon the use of the word "indemnity" in Article 2 of the Draft Convention which formed Schedule 1 of the Act.

The Plaintiff alleged that, if the *Croxteth Hall* had not been wrecked, he would have been re-engaged on that vessel for a subsequent voyage.

Held:

(i) That the Act only permitted the Plaintiff to claim wages at the rate to which

[1] [1904.] A.C. 287 at p. 291.

he was entitled under his agreement of service, and he was not entitled to claim subsistence allowance;

(ii) that the statute fixed a general standard of relief (two months' wages) available for all seamen who were unemployed subsequent to a termination of their agreement of service as the result of a wreck at a date earlier than that contemplated under the agreement, whether at the time of the termination their agreements had more or less than two months to run. The Act did not grant an indemnity but a conditional safeguard;

(iii) that J. M., having shown that he was unemployed for two months after the date of the wreck of the vessel, and the owners having failed to prove that he could have obtained employment, he was entitled to judgment for two months' wages as from the 27th February 1929.

The issues in the case of the *Celtic* were the same, and the judgment was to the same effect.

The owners of the *Croxteth Hall* and the *Celtic* appealed against the judgment.

It was contended for the Appellants:

(i) That the true construction of the Act was that a seaman was entitled to an indemnity against loss of wages which he would have earned under his agreement if there had been no wreck up to the limit of two months;

(ii) that, the language of section 1 of the Act being capable both of the interpretation contended for by the owners and of that put upon it by the court below, the Court was entitled to have regard to the preamble and the text of the Convention in the Schedule to ascertain which was the true interpretation.

Held by Scrutton and Greer L.JJ.:

(i) That the interpretation of the Act in the court below was correct and that the meaning of the words of section 1 was clear and unambiguous and, in these circumstances, it was not possible to have recourse to the preamble or the Convention in the Schedule to put another meaning upon them; though, if the language of the section had been ambiguous, it would have been possible to do so;

(ii) per Greer L.J., that, if the language of Article 2 of the Convention in the Schedule were taken into consideration, it was doubtful if it would assist the Appellants' contention since, under that article, indemnity was to be accorded to seamen against unemployment (loss of wages) resulting from the wreck and there was nothing in the article limiting the indemnity to loss of wages under the agreement of service then in operation;

by Slesser L.J. (dissenting):

(i) That the language of section 1 of the Act was ambiguous and recourse should be had to the preamble and the scheduled Convention to ascertain its interpretation;

(ii) that the preamble and Convention showed that the intention was only to grant the seaman an indemnity against unemployment resulting from the wreck;

(iii) that, if the shipowner showed that the agreement of service would have terminated in any case at some date prior to the expiry of two months from the date of the wreck, he had *ipso facto* discharged the onus upon him under sub-section 2 of proving that the subsequent unemployment was not due to the wreck. But for this Act, the seaman's right to wages would have terminated under section 158 of the Merchant Shipping Act, 1894, at the date of the wreck, although prior to the date contemplated in the agreement for the termination of the service.

DECISIONS OF CANADIAN COURTS.

The Force of International Comity in Private Law.

In the English case of *Foster* v. *Driscoll*[1] the present Lord Chancellor, then Sankey L.J., in considering the validity of a contract made in contemplation of rum-running undertakings in breach of the laws of the United States of America, stated: "In my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country", and held, together with the

[1] [1929] 1 K.B. 470.

majority of the Court of Appeal, that the contract in question was invalid. About the same time somewhat similar issues were raised in Canada, and it is interesting to consider the decisions of the Canadian courts in these cases.

The first, *Walkerville Brewing Co.* v. *Mayrand*,[1] was tried before Raney J. in the Supreme Court of Ontario. In this case the Brewing Company made an agreement with the Defendant Mayrand for the use of his dock for the export of liquor to the United States. One of the terms of the agreement was that no liquor other than that of the Plaintiff company should be shipped from Mayrand's dock. Later on it was alleged that other individuals or companies were shipping liquor over Mayrand's dock, and the Plaintiff company applied for and were granted an interim injunction restraining the Defendant from allowing the dock to be used in this way. The Plaintiff company then appeared before Mr. Justice Raney and asked that the injunction be continued. This he refused to do, and in giving his reasons for so refusing stated: "It is said that the liquor export or rum-running business is lawful under Canadian law, and that the courts must therefore treat agreements with reference to it precisely as they would treat agreements having reference to the exportation of any other goods by the usual channels, and in the usual way. I put it to counsel for the Brewing Company whether, if an agreement made in Ontario were on its face clearly in furtherance of a conspiracy against the constitution and laws of a foreign, friendly nation, he would argue that our courts would enforce it, and he was driven by the logic of his argument to answer that he would—reserving, of course, his contention that the court was bound to assume that the business of his clients was legitimate until the contrary was definitely established by direct evidence. As I remarked, then the court could only make that assumption if it were deaf and blind and idiotic . . . and that it was as much the duty of the courts to refrain from creating international enmity as it is for the legislative and executive branches to promote international amity, and further, it is not at all a question of the Statute law of Canada, or of Ontario, it is purely a question of public policy, that is to say, public policy in the administration of the law by the courts, which is essentially different from what may be public policy in the view of the legislature, which, as has been said, may be and often is nothing more than expediency. Public policy in this sense, or policy of the law, has been defined as the general spirit or purpose of the law as deduced from the course of legislation or from the principles of justice, morality, and convenience, and applied by the courts in matters concerning which the law is not explicit. Under this doctrine of judicial public policy, as distinguished from legislative public policy, the authorities indicate that freedom of contract will be restrained for the good of the community, and that may be done in a proper case where the contract conflicts with the morals of the times or contravenes some important established interest of the social order . . . the success of this action would mean the recognition by the court of the rum-running business as a legitimate Canadian industry, which is impossible."

On appeal, this finding was reversed by the Appellate Division of the Supreme Court of Ontario, Mulock C.J.O. stating: "So far as it appears, the importation of liquor into the United States of America is lawful; such importation is not *malum in se*. . . . The business of exporting liquor to the United States may have the demoralizing effect attributed to it by the (trial) judge, but such consequences do not determine its illegality, it is legal or illegal irrespective of consequences."

[1] [1928] 63 O.L.R. 5; reversed [1929] 63 O.L.R. 573.

Shortly after this a somewhat similar matter came before Mr. Justice Raney in the case of *Harwood and Cooper* v. *Wilkinson*.[1] The facts were as follows. Wilkinson had obtained at different times sums of money from Cooper, to whom he gave as security two mortgages. Cooper was engaged in the business of importing liquor into the United States and in this was assisted by the Defendant Wilkinson. Cooper, together with his agent Harwood, to whom he assigned his mortgages, brought action against Wilkinson on the covenants in the mortgages for the repayment of the money loaned. The Judge, despite the reversal of his decision in the *Walkerville Brewing Co.* case, felt that his views had been sustained by the English Court of Appeal in the case of *Foster* v. *Driscoll*, cited above, and, after quoting at some length from that judgment, he decided in favour of the Defendant, on the ground that the money advanced by Cooper to Wilkinson was for an illegal purpose (i.e. the smuggling of liquor into the United States), and on the further ground that the Plaintiff refused to answer proper questions put to him on his examination for discovery.

On appeal, the Appellate Division of the Supreme Court of Ontario again reversed his decision, mainly on the ground that "the Plaintiff in order to make out his case did not have to disclose any illegal foundation. That there was no evidence that the Defendant was aware of any illegal purpose, or that the money was being advanced to further it".

On appeal to the Supreme Court of Canada, the views of the Ontario Court of Appeal were sustained on practically the same grounds, namely, "the Defendant to support his claim was bound to prove, not only the illegality, but also its connexion with the transactions in question; the signatures of the Defendant to the mortgages being admitted and the advance of the money not being contested, the Plaintiff established a *prima facie* case by showing non-payment; he was not obliged to invoke in any wise the alleged illegal transactions in support of his claim".

In the meantime the Dominion Legislature seems to have achieved the ends so strongly desired by Mr. Justice Raney by legislative action,[2] for it has

[1] [1929] 64 O.L.R. 392; reversed 64 O.L.R. 658; reversal confirmed [1931] S.C.R. 141; discussed 8 C.B.R. 469.

[2] Chap. 19, 20–21 George V 1930.

An Act to amend the Export Act.

1. No intoxicating liquor now or hereafter held in bond or otherwise under the control of officials of the Dominion Government under the provisions of the Excise Act, the Customs Act, or any other Statute of Canada shall be released, or removed from any bonding warehouse, distillery, brewery, or other building or place in which such liquor is stored in any case in which the liquor proposed to be removed is destined for delivery in any country into which the importation of such liquor is prohibited by law.

(b) It shall be unlawful to grant a clearance to any vessel having on board any intoxicating liquor destined for delivery in any country into which the importation of such liquor is prohibited by law.

(c) It shall be unlawful to make any entry for exportation of any intoxicating liquor destined for delivery in any country into which the importation of such liquor is prohibited by law.

2. Intoxicating liquor in this section means any liquor coming within the definition of "intoxicating liquors" in the Canada Temperance Act.

3. The Governor-General-in-Council may make such orders and regulations as he may consider necessary for giving effect to any of the provisions of this section.

amended the Export Act in order to prohibit the export of intoxicating liquors to the United States.

One other case, the *s.s. Vedas*,[1] is pending before the courts. This Canadian ship, *en route* through the Great Lakes from one Canadian port to another with a cargo of liquor, was found lightening her cargo, and the allegation is that the liquor was being taken to the United States. It is probable, however, that the decision in this case will turn on the interpretation of Canadian statutes and not on the international issue of the legal consequences of the acts of the nationals of one state done in furtherance of objects that have for their end the breach of the laws of another friendly state. N. McK.

DECISIONS OF UNITED STATES COURTS.

Supreme Court.

The *Great Lakes Diversion Case*, the history of which was reviewed by Professor H. A. Smith in the *Year Book* for 1929[2] (pp. 144 ff.), was finally disposed of by a decree of the United States Supreme Court in April 1930.

The decree enjoined the State of Illinois and the Chicago Sanitary District from diverting after July 1, 1930, any of the waters of the Great Lakes–St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise, in excess of 6,500 cubic feet per second in addition to domestic pumpage. (The water being diverted at the time was 8,500 cubic feet per second.) After December 31, 1935, the diversion must be reduced to 5,000 cubic feet per second, and after December 31, 1938, unless good cause can be shown to the contrary, it must be reduced to 1,500 cubic feet per second.

The decree is as to certain points a compromise as between the contending parties, but in the main it marks a defeat for Chicago, which urged that no limit be set by the Court on the amount of diversion to be allowed and that the city be given the period up to 1948 or later in which to complete its sewage disposal plant now under construction. The Lake States, as Plaintiffs, asked that the time limit for this purpose be fixed at five years. The period of nine years allowed was therefore a compromise. But by the terms of the decree it is open to Chicago and the Sanitary District to show that the period fixed is insufficient. The contention of the Lake States that, under a rule of the Common Law, water could not be legally diverted from one natural watershed to another in the absence of an inter-state agreement was left undecided by the Court. Their plea that the course of the Chicago River be reversed so that it would flow into Lake Michigan as it originally did and that water pumped from Lake Michigan for sewage purposes should after purification be returned to the Lake was rejected as excessive. On this point the Court sustained the contention of the Defendants that it was unreasonable to apply the Common Law rule relative to riparian rights to great inland seas like the Great Lakes, which cover a hundred thousand square miles, but that the "rule of comity" should be applied, under which there should be an equitable balancing of advantages and disadvantages. In the present case the advantage to the City of Chicago so greatly outweighed

[1] Pending before the Admiralty Division of the Exchequer Court of Canada.

[2] See also Garner, "The Chicago Sanitary District Case", *Amer. Jour. of Int. Law*, Oct. 1928, pp. 837 ff., and Dealey, "The Chicago Drainage Canal and St. Lawrence Development", *ibid.*, April 1929, pp. 306 ff.

the relatively small damage which the complaining states would suffer by the lowering of the lake levels by hardly more than an inch, that it seemed unreasonable to require water diverted for purely domestic purposes to be returned to the Lake.

It is important to note that the injunction of the Court in this case applies only to the diversion of waters by the City of Chicago for domestic water supply purposes and for the disposal of sewage. In case the project for the construction of the Lakes-to-the-Gulf waterway is undertaken, which will involve a large diversion for the purpose of navigation, the Supreme Court will doubtless be called upon to determine whether diversion for such a purpose would be legally permissible. The Court preferred not to make a pronouncement on that question until it was directly raised as an issue.

Circuit Court of Appeals.

Eligibility of Pacifists to Naturalization in the United States.

In the cases of Dr. MacIntosh and Miss Bland,[1] the United States Circuit Court of Appeals in July 1930 admitted to citizenship of the United States two British subjects who hold pronounced pacifist views. Dr. MacIntosh is a professor in Yale University, who during the World War served as chaplain with the Canadian forces; Miss Bland, daughter of an English clergyman, had served as a nurse with the American army. Both had been denied American citizenship by the Federal District Court on the ground that their refusal to promise to bear arms in defence of the United States did not meet the requirement of the naturalization laws that petitioners for naturalization must prove their "attachment to the Constitution". The decisions in both cases were overruled by the Circuit Court of Appeals on the ground that the cases of the petitioners were distinguishable from that of Mrs. Schwimmer (see the *Year Book* for 1930, p. 239), in which the Supreme Court had held that an alien woman who refused to promise to bear arms under any and all circumstances and who avowed that she was an "absolute atheist" and an "uncompromising" pacifist, with no sense of nationalism but only a cosmic consciousness of belonging to the human family, was ineligible for naturalization. Professor MacIntosh stated in his petition that while he was ready to give the United States, in return for citizenship, all the allegiance he had ever given or could give any country, he could not put allegiance to any country before his allegiance to the will of God. He was willing, however, to give an undertaking to bear arms in defence of the country provided he were allowed to determine for himself whether it was a morally justified war; but he was unwilling to give a blanket promise beforehand to support any and every war that might occur in the future. In its opinion the Court said: "A citizen sharing views which amount to conscientious or religious scruples against bearing arms in what he regards as an unjustifiable war is akin to one having conscientious scruples against all wars. There is a distinction between the morally justified and an unjustifiable war as recognized in international law. Recognition was given to such distinctions in the recent Kellogg Pact. It strongly lies in the desire to maintain peace and abolish war. . . . The Appellant, from his answers, indicates an upright sense of obligation to his God and has carefully explained his willingness to be a citizen of the United States, assuming the responsibilities and

[1] *Mackintosh* v. *United States* and *Bland* v. *United States*, 42 P. (2nd) 842, 845.

obligations of its form of government, and at the same time, he has a high regard for his general duty to humanity. He wishes to keep pure his religious scruples." Miss Bland while stating that her conscience as a Christian would not permit her to swear to bear arms, was willing to go to the front and if necessary nurse wounded soldiers, and would in other ways defend the Constitution so far as her conscience as a Christian would allow. The Government and the Constitution, said the Court, could not exact more from any applicant.

From the decision of the Circuit Court, the Government has taken an appeal to the United States Supreme Court.

Federal District Courts.

Immunity of Foreign States from Suit in the Courts of the United States.

In the case of *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen et al.*,[1] the Government of Sweden, representing its Railway administration to be a corporation, voluntarily brought suit in the Federal District Court, in which the Defendant filed a counter-claim.

The Government of Sweden, without filing a proper plea of immunity from suit, answered the counter-claim and litigated until eventually defeated. Subsequently, attachment proceedings being brought on the judgment entered to obtain possession of certain funds of the Swedish Government on deposit in an American bank, the Swedish Government filed a plea of immunity. Held by the United States Circuit Court of Appeals that the Swedish State Railways was not in fact a corporation as alleged in the complaint and in no way a distinct entity from the Swedish Government but was a part of the Swedish Government; that judgment having been entered against Sweden, as a litigant under a name of its own selection representing it to be a corporation, the judgment should be enforced against the debtor upon proof of the litigant's true identity; that where a defendant appears in a suit by an incorrect name and does not plead immunity and judgment is rendered against him, the judgment is binding and he may be connected with the judgment. But consenting to be sued does not give consent to seizure or attachment of property belonging to a sovereign government. The court added, however, "that it was regrettable that Sweden could thus escape payment of a valid judgment against it. Appellant has been misled in the belief that this Plaintiff was a separate entity—apart from the Government—and now when a sufficient number of years has passed making possible a plea of limitations or laches against suing in Sweden [see letter to the League of Nations], Appellee appears and pleads its sovereign immunity. Whatever may be Appellant's remedy to collect its valid judgment, it should not be necessary to resort to further litigation. It is hoped that the judgment of our courts will be respected and payment made by the Swedish Government."

Effect of War on Treaties.

The question of the effect of the war between the United States and Germany (1917–1918) upon treaties concluded in 1827 between the United States on the one hand and the German free cities of Hamburg, Bremen, and Lübeck, and the Kingdom of Prussia, on the other was involved in the case of *Rickmers Rhederei Aktiengesellschaft* decided by Judge Mack of the Federal District Court of New York in July 1930 (45 F. 413). The treaties exempted German-owned

[1] 43 F (2d) 705 (1930).

ships from the payment of tonnage taxes levied by the United States which were not levied equally on American ships. Taxes aggregating more than $1,000,000 were levied upon and paid under protest by German shipowners between October 1920 and November 1921. Upon suit for recovery of the amounts paid, the Government of the United States contended that the treaties were abrogated by the outbreak of war between the parties in April 1917. The German shipowners contended that the effect of the war was merely to suspend the operation of the treaties, and that upon the conclusion of the armistice they were revived. This contention was sustained by the Court.

James W. Garner

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1929. Vol. I, pp. 693; Vol. II, pp. 627; Vol. III, pp. 625. Paris: Hachette. 1930.

These three volumes (nos. 26–8 of the series) contain fifteen of the courses delivered at the Academy in 1929. The lecturers were drawn as usual from various countries (though the present volumes contain no English contributions), and they discussed a number of interesting subjects having, naturally, little in common except the high standard which is associated with the Academy. A reviewer, therefore, can do little more than indicate the items of a very full and attractive menu.

Professor Ch. de Visscher writes on the juridical nature, and the limits of the authority, of *Les avis consultatifs de la Cour Permanente.* In an interesting analysis he traces the interaction of the theory and the practice of Advisory Opinions, and shows how supple and adaptable an instrument they have added to the resources of international organization.

Professor Donnedieu de Vabres (*L'action publique et l'action civile dans les rapports de droit pénal international*) writes learnedly of the relation between criminal and civil process in respect of the same wrongful act, and shows that the existence of different rules on this matter in different municipal systems produces inconvenience internationally. The article is based on French practice, and the interest both of the subject and of its treatment is rather specialized.

Professor Cavaglieri's *Règles générales du droit de la paix* resembles a treatise rather than a course of lectures. Professor Cavaglieri is a positivist, and a very formidable exponent of that creed. The present reviewer believes that positivism can only avoid issuing in the type of juridical scepticism to be found, for example, in Triepel (which Professor Cavaglieri rejects) at the cost of inconsistency with its own premises, and he ventures to suggest that Professor Cavaglieri has saved the binding character of international law only by combining two positions, of which the first alone is really positivist. He says, on the one hand, that "sovereignty" (and he justifies the term rather lightly as "une expression traditionnelle, dont tout le monde comprend le sens") makes possible a relation of co-ordination between states on which is based "un système de règles fondées exclusivement sur le concours de leurs volontés". On the other hand, he accepts a "société juridique internationale", in which "les rapports entre états ont perdu leur nature purement contractuelle pour se fondre dans une unité supérieure, dans une communauté de droit, s'exprimant dans l'acceptation universelle de certaines règles". On these premises he is able to maintain that a state, having once accepted the obligations of the law, cannot withdraw from them at will, as it ought, on strictly positivist premises, to be able to do; and even so, to explain how a *new* state becomes subjected to the law he is driven to rely on the theory of a *tacitum pactum*, which a state is free to accept or reject at will (surely a manifest fiction). Whatever one may think, however, of the philosophical soundness of his initial position, no critic will question the masterly character of the author's survey of the whole field of customary law. What he has attempted is to present systematically all those rules of the law of peace which, when tested by reference to the practice of states, are truly general in

their application, to the exclusion of those which, for one reason or another, belong to *droit particulier*. The work is one of permanent value.

Baron Nolde (*La monnaie en droit international*) discusses certain monetary questions which concern international law (international payments, monetary unions, &c.). The subject, as he says, is "episodic", and we cannot yet speak of a "droit monétaire international".

Mr. T. H. Healy of Georgetown (*La condition juridique de l'étranger spécialement aux Etats-Unis*) presents a clear and generally objective account of American law and policy in regard to aliens, but his rather full defence of the policy on Japanese immigration overlooks the real nature of the Japanese grievance. It was not to that policy in itself, which is reasonable enough and fully understood by Japan, but to the offensive manner of its application in 1924 that Japan objected.

Professor Fedozzi (*De l'efficacité extraterritoriale des lois et des actes de droit public*) examines the extra-territorial application of administrative laws and acts of various kinds from the point of view that international exigencies have brought into existence a new branch of law bearing a relation to administrative law similar to that which private international law bears to private law. Legal theory, he thinks, has failed to keep pace in this matter with the development of the facts.

Professor Borel (*L'Acte Générale de Genève*) describes the genesis of the Act and analyses its provisions. He passes rather lightly over certain points in its construction which are both difficult and important; for example, the extent of the discretionary powers of the arbitral tribunals, which *ex hypothesi* are to deal only with non-juridical disputes, is a crucial matter which ought not to be left in the ambiguity with which Article 28 has surrounded it. The writer thinks that the Act will perhaps produce its full effects only in a distant future, and that its present value is mainly moral: "les conventions internationales—fussent-elles même d'une application rare dans la pratique—constituent, à l'encontre de visées belliqueuses, un obstacle dont la force morale ne saurait être trop mise en relief". The contrary view—that conventions so framed as to be unlikely to find practical application are more likely to discredit than to help the cause of peace—is equally tenable.

M. Matos of Guatemala (*L'Amérique et la Société des Nations*) shows how unfortunate have been the effects in Latin America of Article 21 of the Covenant. He would democratize the Council and extend the principle of regionalism in the League.

Professor Salvioli (*La responsabilité des états et la fixation des dommages et intérêts*) deals with questions of the measure of damages, such as remoteness, duty to mitigate, calculation of interest, &c., which have long been important to the municipal lawyer. The method of discussion, which is based on an examination of the decisions of international tribunals, confirms in an interesting way the argument of Dr. Lauterpacht's article earlier in this volume,[1] and the whole article is significant of the change which is taking place in the international system under the influence of its more frequent application by courts to complicated situations of fact. More and more the centre of interest is shifting to a sphere in which the "practical" lawyer is at home.

Histoire de la paix publique en Allemagne au moyen âge by M. Ludwig Quidde,

[1] *Ante*, p. 31.

whose long and honourable work in the cause of peace was recently crowned by the award of the Nobel Peace Prize, is an objective account of the historical facts leading up to an analogy between medieval Germany and the present international scene. It was not, the author says, any improvement in morality or any softening of political manners that abolished "private war" in medieval Germany, but two external facts, the invention of powder and the pressure of foreign enemies. He believes that once again "c'est la guerre qui tuera la guerre".

Other courses included in these volumes, which unfortunately can here be only named, are *Le régime des concessions étrangères en Chine* by Professor Escarra of Grenoble; *Le statut international du Rhin* by M. Jean Hostie, Secretary General of the Central Commission of the Rhine; *La condition internationale des missions catholiques* by M. Goyau, Professor of the History of Missions in the Catholic Institute of Paris; *La question des zones démilitarisées* by M. Erich of Finland; and *Conception du droit international privé d'après la doctrine et la pratique en Yougoslavie* by Professor Péritch of Belgrade. J. L. B.

THE LAW OF THE AIR

Air Power and the Cities. By J. M. Spaight, C.B.E., LL.D. London: Longmans, Green & Co. 1930. vii+244 pp. (15*s.*).

Dr. Spaight has written this book, as he says in his preface, in the nature of a sequel to his former book *Air Power and War Rights*,[1] or rather to a section of that book. But here he approaches his subject, as he tells us, from a different angle, namely the modern practice of naval bombardment, i.e. the practice obtaining from and after 1813 and the unfortunate Anglo-American war of that date. He summarizes the facts of naval bombardments of the nineteenth century and the recent war—some of them, like those of the Crimean war in both the Baltic and the Black Sea, now largely forgotten—and he argues forcibly that the rules applicable or applied to those bombardments will serve as governing precedents for bombardments from the air. Further, and many readers will find in this thought the most vital portion of the book, he conceives of air power as "a preventive, a war-breaking rather than a war-making force . . . the ideal instrument for use in the sanction wars of the future". This view he is not alone in supporting—for example M. de Jouvenel, lecturing last December at La Nouvelle École de la Paix,[2] took substantially the same view.

The principle which Dr. Spaight discovers in naval bombardment is that to which he gives the name of the *military objective*—that is, apparently, that the attack must be on a fortification, munition factory, or other object of a military character, subject, however, to a vague qualification to the effect that when "the loss of life and property of innocent persons" (? persons not directly engaged in or closely connected with military operations) "would be out of all proportion to any military advantage likely to be secured by the operation", then the general principle no longer applies (p. 58). This principle was recognized in the draft rules for Air Warfare prepared by the Jurists Committee which sat at The Hague in the winter of 1922–3, but the translation of the

[1] See review in *British Year Book* for 1925, p. 229.
[2] See *Europe Nouvelle* of December 20, 1930, p. 1820.

principle into definite precepts for the airman proved to be a matter of great difficulty, and the draft, in the view of Dr. Spaight, sins by both omission and commission. Is it not, however, impossible to prepare a code of objective rules which will guide the man in control of a bombing aeroplane who is feeling his way in the dark over an enemy country? Dr. Spaight (p. 213) suggests a formula which will allow the bombing of "railways and bridges *predominantly* used for military purposes or constituting an *important* strategic link . . . *important* wireless installations; *important* fuel oil and petrol installations; *important* factories engaged in the production (or repair) of aircraft, arms, ammunition, and implements of war or their essential ingredients, components, or accessories".[1] But how large in such a formula must be the subjective element of the judgment of the individual aircraft commander! How accurate must be his knowledge of the enemy's country and the manner in which the enemy is at the moment utilizing his resources of material and men. When all has been said, can we reach any more definite conclusion than that air warfare, if it is to be carried on, will in fact be conducted as far as possible with a view to winning the war and ought to be subject to such limitations as a humane and chivalrous spirit will impose for the avoidance of unnecessary suffering? And if aircraft are to be used in a warfare of sanctions, when the material force may be assumed to be predominantly on the side of the sanctions, the obligation to avoid imposing unnecessary terror or suffering applies with special force.

As to Gas Warfare, Dr. Spaight insists on its illegality, if not under the unratified Washington Treaty of 1922, then under the Geneva Gas Protocol of 1925. The prohibition is now repeated on condition of reciprocity (too late for mention in Dr. Spaight's book) in the draft Disarmament Convention of December 1930. But, as Dr. Spaight remarks, "it would be unwise to regard the battle against gas warfare as yet completely won". The author does not treat separately bacteriological warfare, which the draft Disarmament Convention prohibits unconditionally.

It is hardly necessary to add that, as is to be expected from a master of his subject, the book is clearly and temperately written and deserves the attention of every serious student of the conditions of modern war. J. F. W.

La Protection des Populations Civiles contre les Bombardements. Consultations Juridiques de A. Hammarskjöld, Sir George Macdonogh, Mr. W. Royse, Vittorio Scialoja, Marcel Sibert, Walter Simons, Jonkheer van Eysinga, A. Züblin. Genève: Comité International de la Croix Rouge. 253 pp. (Swiss frs. 10.)

This is a highly interesting collection of opinions of distinguished men on the question of the liability of civil populations to bombardment from the air. Opinions not written in French are accompanied by a French translation. The interest of the book arises not only from the intrinsic importance and actuality of the matter under discussion, but also from the opportunity which is given of studying the different methods of approach to the same problem by minds of different nationalities and schools of training.

A reader, whatever his nationality, can hardly fail to be impressed with the complete inadequacy of the older rules of warfare, and, it may be added, of any rules likely to be accepted or observed at the present day, to afford any protec-

[1] Italics not in the original.

tion to the great mass of the urban populations of Western Europe—in a few years it may be necessary to add "and of America"—in a war when the enemy disposes of an effective air force. Thus, Professor Royse of Harvard tells us that "in view of the generalities and exceptions which emasculate the existing rules of war, only one conclusion can be reached: that existent International Law does not afford protection against bombardment to the civil population outside the zone of artillery fire". Sir George Macdonogh concludes that "the value of aerial bombardment as a weapon of offence is so great that it seems impossible to lay down any effective rules for the protection of the civil population, outside the zone of artillery fire, which are likely to be observed, and it is submitted that the only effectual means of protecting non-combatants from the horrors of war is by abolishing war itself". Mr. Hammarskjöld is perhaps a little less discouraging; he looks for aid from the League of Nations pending the finding of the "true solution in the gradual disappearance of war". M. Scialoja suggests "penal sanctions" against those who should violate the rules laid down, but he admits that in practice it might be feared that a state which won a war by (? and after) the use of prohibited practices might succeed in escaping punishment. M. Sibert calls for reprisals, under direction of the League. Dr. Simons tells us that "in my opinion there is no way of combating effectively such technical refinements and such a moral brutalization of war, except the proscription of war in general". M. van Eysinga has some hope that it may be possible to "demilitarize chemistry" under international control, and thinks that the Red Cross may, by action on the public conscience, make chemical warfare from the air impossible. Finally, Colonel Züblin suggests the draft of a convention to protect the civil population against aerial bombardment. This project allows of bombardment of "military objectives", which he defines very clearly, and also what he calls "mixed objectives", being things which are intended for a non-military use but acquire considerable importance for an army in case of war; these mixed objectives include railways, canals, roads, electrical and hydraulic factories, chemical factories (when a state has employed poison gas) and wireless emission stations. It is a formidable list. J. F. W.

The Law of Aviation. By G. D. Nokes, LL.D. and H. P. Bridges, LL.D. Chapman & Hall. xix+209 pp. (12*s.* 6*d.*)

This book, described by its publishers as "an authoritative treatise", is divided into two parts, dealing respectively, in the main, with the law of civil aviation in time of peace and the law of combatant aviation in time of war. Of these two subjects, it may be suggested that the former is more appropriate to an authoritative treatise than the latter. The first part of the book would, however, gain considerably in value if the authors had given the actual texts of the governing documents and thrown their remarks into the traditional shape of a commentary upon legislation. It also might be better not to introduce into a book of this nature general remarks, not always impervious to criticism, on the nature of international law. For example, casual references to the question whether or not international law deserves the title of law are out of place in a book on the practice of aviation; they contrast strangely with practical information as to fees for licences, prohibited areas, &c.—topics on which the book gives full and, so far as a reviewer can test the matter, reliable information.

The second part of the book touches on a number of interesting questions,

many of which are more fully discussed in the other works here reviewed, dealing with the law of belligerency in the air. The authors have, however, added a large amount of useful information as to the rights and duties of members of His Majesty's Air Forces in time of war—the grant of quarter, destruction of machines, &c., &c. It is perhaps open to question whether it is well to combine in one book the two separate topics of civil aviation and war in the air. It is unlikely that those who use the book for practical purposes will be in search of information at one and the same time on both topics. After all, one would not expect a book on the law connected with horses and horse traction to contain a section on the duties and rights of cavalry. The result, however, has been a book of considerable interest both to the aviator and to the general reader. J. F. W.

Internationales Luftrecht. Von Dr. Kurt Volkmann. Berlin: Fried. Dümmlers Verlagsbuchhandlung. 1930. 218 pp. (Volume 31 of the collection "Völkerrechtsfragen" of H. Pohl and M. Winzel. Price not stated).

Like the *Law of Aviation* of Drs. Nokes and Bridges, this work is divided into two sections, Peace and War. It is, however, confined, as its title indicates, to international law and does not expound the municipal law or regulations of any one country, though it bases itself on a comparative study of the rules obtaining in different countries. And this is so in spite of the remark of the author that "the peace-law of the air is not a separate legal province. . . . It is a mosaic of rules, partly of public and partly of private law, connected with flight. Constitutional, criminal and civil law—the law of persons, of obligations and of things—fiscal, customs, and insurance law, all combine to supply the content of Air Law in peace time. But as aerial transport presses further and further across the boundaries of states, the law of the air cuts deeper and deeper into international law".

The author has read widely in both contemporary and historical authorities of Western Europe and America, and has produced a treatise of interest and, for the law of peace, of authority. His discussion of the conflict between the two theories of air law—the theory of the freedom of the air (*Luftfreiheitstheorie*) and the theory of air-territoriality (*Gebietshoheitstheorie*)—is informative; he here reveals himself as a well-armed Cato of the cause which now must be regarded as lost. (Incidentally a slip on p. 37 may be noted: the text reads as if Coke and Blackstone were both writers of the beginning of the nineteenth century.)

On the law of war, the book is less satisfactory. The author has failed to clear his mind of the mentality of the world-war. His historical allusions to the events of the war hardly show sufficient detachment, and his reiterated assertion that the doctrine that war is waged equally against combatants and non-combatants is distinctively English (see e.g. p. 147) is not a good example of the international spirit. But the mere fact that the author is led into these exaggerations may have its uses as showing how difficult is the discussion as between possible belligerents of the whole topic of the law of war. As to bombardment, the author's view of the present position (p. 157) is that "the question whether aircraft may be used for the bombardment of the enemy has not been definitely settled. A solution is all the more urgent in that aircraft are capable of carrying the war behind the fighting line and inflicting sufferings on the peaceful population of the enemy state". In the discussion which follows, the author seems to misunderstand the

position taken by Dr. Spaight. It is a pity that the collection of opinions made by the Red Cross was not available when the book was written.

Lastly, be it remarked that the book has the great advantage, for a non-German reader, of being printed in Latin characters; it also has the merit of an index. J. F. W.

Die zwangsweise Durchsetzung im Völkerrecht. By Dr. Herbert v. Bardeleben. Leipzig: Robert Noske. 1930. 90 pp. (6 Marks.)

The principal object of this monograph is to discuss the traditional instruments of enforcing international law—retortion, reprisals, pacific blockade, intervention, and war—by reference to the provisions of the Covenant of the League of Nations, of the Locarno Pact and the Treaty for the Renunciation of War. In Part I, the author gives a presentation of the legal rules obtaining prior to the setting up of the League of Nations. Here the chapter on Retortion seems to be well done, and most people will agree with the author that, contrary to the current definition of retortion (for instance, that given by Oppenheim), it is not necessary that the acts giving rise to retortion should be discourteous, unfair, or inequitable. The original act may be intended to safeguard the interests of the state which has undertaken it, and it is sufficient that that act has injurious effects upon the other state. A tariff need not be unfair or inequitable in order to give rise to retaliation. In Part II, chapters dealing with the limitation of the recourse to reprisals by the Covenant, with the sanctions of Article 16, with the Locarno Pact and the Treaty for the Renunciation of War are of interest. As to reprisals, the author is of the opinion that even economic and other non-military measures are not permissible without any limitations. All depends, he says, upon whether they may in themselves lead to a rupture; if they are calculated to lead to that result they come within the prohibition of Article 12. In the chapter on the Kellogg Pact, the author discusses the question whether the result of the Pact is to prohibit war or to abolish it altogether, so that it ceases to be a relation regulated by law, with the result that the whole customary and conventional international law relating to war becomes inapplicable. He chooses the former alternative, mainly for the reason that an express and unequivocal provision would have been necessary in order to effect such a radical change in existing international law. H. L.

The Canons of International Law. By T. Baty, D.C.L., LL.D. London: John Murray. xii+518 pp. (21*s.*)

Dr. Baty's volume covers a large part of the field of international law. It is compiled on somewhat original lines.

After a preliminary disquisition on states and their attributes, such as sovereignty and independence, he specifies four characteristics which the rules of international law should possess. They must be simple, certain, objective, and elastic. These characteristics Dr. Baty elevates into Canons, and under one or other of them he ranges all the sections of the field of international law which his book covers.

Under the canon of Simplicity are grouped such subjects as ambassadors and consuls, the exterritoriality of foreign sovereigns and armies, merchant ships considered as territory, straits, bays and lakes, river transit, and water supply. Under the canon of Certainty come such subjects as the inviolability

of territory, pacific blockade, independence, the three-mile limit, and enemy character in prize. Under the canon of Objectivity are grouped the problems relating to the continuity of states, recognition, and a varied category of war questions, such as prohibition of an enemy's trade, contraband, continuous voyage, visit and search, blockade, and miscellaneous prize matters. The canon of Elasticity comprises nationality, the Monroe Doctrine, modern protectorates, the signature and force of treaties, a variety of matters relating to neutral duties and the conduct of warfare, the exemption from capture of private property at sea, and peaceful modes of settling disputes.

The classification adopted seems somewhat arbitrary. It is profoundly true that the rules of international law ought to be simple, certain, objective, and elastic, but the subjects in respect of which the rules should be simple are not limited to those which are grouped by Dr. Baty under the canon of simplicity, nor are the subjects in which the rules should be certain limited to those grouped under the canon of certainty. Dr. Baty does not himself intend that they should be so regarded. When one reads the book attentively, one finds such statements, for instance (p. 170), as that the canon of simplicity requires the adoption of allegiance as the criterion of enemy character, though this subject is dealt with under the canon of certainty. It is perhaps a little unfortunate that if Dr. Baty did not intend the application of his four canons to be limited to the subjects grouped respectively under each, he should have parcelled out the field so sharply, for it is confusing to find subjects relating to the laws of war strewn about almost indiscriminately between certainty, objectivity, and elasticity.

There is a want of proportion in the space devoted to particular subjects. The territoriality of bays is a question constantly cropping up in practice; four pages are devoted to it. Piracy but seldom disturbs international relations, yet it is discussed at length in ten pages. Only thirty lines are devoted to rights of navigation on international rivers, though three pages are devoted to the dispute at Chicago about the extraction of water from the Great Lakes.

Dr. Baty is no believer in modern developments of international law, despite his adoption of the canon of elasticity. Few things done by the Allies in the late war are other than anathema to him. His opinion of the League of Nations is so poor that only once in the book can he bring himself to call it anything but the "Société des Nations". Plurilateral treaties, so prevalent of recent years, "may prove the cause of grave embarrassments", while the "whole history of international arbitration has been vitiated by the blind endeavour to establish a court": what is wanted is not a court, but conciliation!

Despite these eccentricities, Dr. Baty's book is crowded with information and with the mention of precedents and incidents unknown to most of the students of international law. It will always be useful to the seeker after knowledge, and perhaps it will prove stimulating to the controversialist. C.

Questionum juris publici libri duo. By Cornelius van Bynkershoek. Oxford: Clarendon Press. 1930. 2 vols. Vol. I, x and xxiv+417 pp., Vol. II, xlvi+304 pp. (30*s.*)

These two volumes constitute No. 14 of the Classics of International Law published by the Carnegie Endowment for International Peace, and edited by Dr. James Brown Scott. They constitute a splendid addition to the library of the international lawyer. The first volume contains a photographic reproduc-

tion of the edition of 1737, with a list of errata and a portrait of Bynkershoek; the second volume contains a translation of the text by Tenney Frank, with an introduction by Dr. J. de Louter, the well-known Dutch Professor of International Law. Bynkershoek was a sound lawyer and knew the value of an index to a law book; he had one prepared for his edition of 1737, which is reproduced in Vol. I, and the present editors have provided an index to the translation.

A notice of this important publication is not the place for a dissertation on the place of Bynkershoek in the development of International Law. The valuable Introduction of Professor de Louter is, however, of great assistance to the student in enabling him to appreciate the learning and independence of thought of this great Dutch jurist. Bynkershoek is often ranked with the so-called positivists, but his positivism was of a somewhat peculiar character. Reason and usage he declares to be the bases of the Laws of Nations, but he asserts or presumes that the dictates of reason coincide with continuous custom, which he calls the first of all tyrants. "Reason" would appear generally to mean nothing more than Bynkershoek's own clear intellect, says de Louter.

Bynkershoek's contribution to the development of the law of neutrality is well known, particularly the emphasis he lays on the distinction between contraband and blockade, a distinction which was not clear in Grotius's writings, and is often not properly understood to-day.

This is the second of the works of Bynkershoek to be published under the direction of the Carnegie Endowment; it redounds to the credit of all concerned, and not least to that of the Clarendon Press. A. P. H.

De Heilige Stoel en het Statenstelsel na 1500. By G. M. H. R. Dahmen. 1930. The Hague: V. H. Monton & Co. x+43 pp.

The actual text of Dr. Dahmen's essay comes to less than thirty pages of rather large print, and within these limits it is obviously difficult to sketch even in outline the international history of the Papacy during 429 years. What he has done is to give us a scholarly and interesting magazine article, which may, let us hope, prove to be the prelude to a more serious study of this important question. The key to the future Dr. Dahmen finds in Article 24 of the Treaty of the Lateran, but he only reaches this point on the last page. The events of two years have already made it clear that the interpretation of this document will rest rather with the statesmen than with the commentators. H. A. S.

La Convention de Genève du 27 Juillet, 1929. Commentaire par Paul Des Gouttes. Geneva: International Committee of the Red Cross. 1930. xl+267 pp.

Monsieur Des Gouttes has written a most exhaustive commentary on the Geneva Convention of 1929. Having been for many years a member of the International Committee of the Red Cross and also Secretary General of the Geneva Conference of 1929, he is peculiarly well qualified to deal with work of this description, and his work must prove of great value should doubts arise as to the interpretation of parts of the Convention. The commentary is preceded by an introduction by M. Max Huber, President of the International Committee of the Red Cross, in which he explains that while the Conference of 1929, like its predecessor of 1906, devoted itself to a large extent to details necessary to ensure the better application of the Convention, a number of innovations have

been made. The more important of these are the following: Provision is made for an identity dise to be worn by all combatants, whieh should have the effect of largely solving the problem of the missing. Medical aircraft for the first time find a plaee in an international convention. The Red Crescent and the Red Lion and Sun are recognized as emblems of the Convention on an equal footing with the Red Cross. Provision is made for the establishment of and repression of violations of the Convention in time of war, and, lastly, it is not necessary for all the states taking part in a war to be parties to the present Convention in order that it may be in force, as it is to be in force between those belligerents which are parties to it. M. Max Huber also deals with the criticism which has been made in certain quarters that the same Powers whieh have outlawed war sent plenipotentiaries to Geneva to revise a convention having for its objeet the diminution of its horrors. He points out that those interested in the cause of the Red Cross have no more ardent desire than to see peace and justice triumph over war and violence, but, nevertheless, they have not been able to close their eyes to the hard faet that war is a sad phenomenon in human existence.

M. Des Gouttes has dealt in such detail with each article of the Convention that his commentary forms a short history of the Conference itself. He shows not only how each alteration in the 1906 Convention has been arrived at, but also discusses proposals which were put forward by various delegations and for one reason or another not aceepted. Some of the questions on which his comments are of special interest are the Italian proposal that a special status should be given to wounded and sick during their detention in hospital, the proposal of the Finnish Delegation that the eivil personnel of government hospitals should be granted the protection of the Convention, the proposal, originally made by the 10th Red Cross Conference of 1921, that in case of urgency an aid society of a neutral country may cross the frontier to help the siek and wounded in the immediate neighbourhood, the much-disputed question of the obligation of the captor state to return medical personnel unconditionally and without delay, the rules applying to medical aircraft, the circumstances in which the emblems of the Convention may be used, the prohibition plaeed on the use by private persons of the emblems of the Convention and of the Swiss Confederation either for eommercial or other purposes, and the repression of violations of the Convention. G. R. W.

Der Schutz des Privateigenthums im Friedensvölkerrecht. Dissertation zur Erlangung des Doktoratis des Staatswissenschaften an der Universität Wien. Von Tibor Donath. Wien, 1930. (To be obtained from the author, Dr. Tibor Donath, Budapest. Ul. Eotvos-u, 28. No price marked. 171 pp.)

This book, as its title shows, is a thesis or dissertation for a doctor's degree at Vienna University. The author writes a vigorous style, and has made himself acquainted with the literature of the subject; in partieular he has studied the diseussion which has taken plaee in the pages of the British Year Book between Mr. Faehiri and the reviewer. His final conclusion is that "every state is obliged by international law when it expropriates private property to guarantee full compensation to the owner. It is immaterial both what treatment it accords to its own nationals and to whom the property is to belong". The reviewer can only regret that the question has not yet formed the subject of a judgment or opinion of the Permanent Court.

Incidentally it is worth noting that the author (p. 9) states positively that private property is completely protected in the law of war by the Hague Convention on the Laws and Customs of War on Land (Articles 46 and 47). It seems to have escaped him that this is not the British nor the American view: the point is discussed—with special reference, it is true, to Article 23 (b) but the discussion is equally applicable to the later articles—in the British official correspondence reprinted by Oppenheim in his short book on the League of Nations (Longmans, 1919) at p. 48. J. F. W.

A Collection of Nationality Laws of various countries as contained in Constitutions, Statutes, and Treaties. Edited by Richard W. Flournoy, Jr., and Manley O. Hudson. New York: Oxford University Press. 1929. xxiii+776 pp. (20*s.*)

This is a compilation of the texts of the laws of various countries relating to nationality made in connexion with the work of the Research in International Law conducted under the auspices of the Faculty of the Harvard Law School.

The editors have prepared this collection with great care and in the majority of cases from official publications. Countries are arranged in alphabetical order, beginning with Afghanistan and ending with Venezuela. Intending applicants for Afghan nationality may like to know that they must be of the age of puberty, have resided for four years in the country, have a clean record as regards crimes, and be free from debt. In addition to the laws of eighty-seven states, dominions, colonies, and mandated territories, there are also provisions taken from twelve multipartite and fifty-four bipartite treaties concerning nationality. This would appear to be comprehensive enough, but the editors have done yet more to aid the inquirer by providing valuable bibliographies under each heading, as well as a comprehensive index.

An examination of this valuable book will enable the student to appreciate the difficulties which faced the Codification Conference at The Hague in the spring of 1930 when it endeavoured to formulate general rules on the subject. The International Law Division of the Carnegie Endowment for International Peace have made all international lawyers their debtors by this publication, and the editors will receive from them a unanimous vote of thanks for their arduous labours. A. P. H.

Traité de Diplomatie et de Droit Diplomatique. Vol. I. *L'Agent Diplomatique.* By Raoul Genet. 1931. Paris: A. Pedone, 13, rue Soufflot. 608 pp. (120 fr.)

The author explains in his preface that he began to write his book as a revised edition of Pradier Fodéré's *Cours de Droit Diplomatique*, of which the second edition appeared in 1899. He found the task impossible. So much that was contained in Pradier Fodéré's book embodied views which were personal to the author, so much has developed along lines that are different from those which Pradier Fodéré himself foresaw, that M. Genet found it necessary to write a new book covering the same ground, but with its contents arranged in a more logical and systematic order.

The work will be completed in three parts, the first devoted to "L'agent diplomatique", the second to "L'action diplomatique", and the third to "Actes diplomatiqués". A supplementary volume will contain miscellaneous information, tables, and indexes. So far the first volume only has appeared. It comprises

Part I, "L'agent diplomatique". Most of it is concerned with what belongs more to the science of international relations than to that of international law.

After a preliminary chapter of an introductory nature, a series of sections is devoted to the *personnel* of the diplomatic world. One treats of the Minister for Foreign Affairs; a short historical sketch is given of the origins of the post in various countries, its duties and prerogatives, and the qualifications required for a successful occupancy of the post. Another treats of diplomatists in general, and the various categories into which they may be divided, their powers, their relations with their own country, their representative character, the qualities required to make a good diplomatist and the methods followed in the more important countries for recruiting the diplomatic service. Information is also given as to the position of officials of the League of Nations and of the various international organizations which have come into being in recent years, and whose members are entitled to diplomatic immunities.

Another section treats of rank, honours, and precedence as it affects the diplomatic world, including precedence among states and sovereigns, and the problems and difficulties to which questions of precedence have given rise in the past, not only as regards the sovereigns themselves, but as regards their diplomatic representatives.

It is the section dealing with Diplomatic Privileges and Immunities that will be of the greatest interest to the international lawyer. M. Genet is a vigorous upholder of the view that it is the principle of exterritoriality which is the foundation of the privileged position of the diplomatic agent, and his well-reasoned pages should give food for reflection to the members of the Institute of International Law, who at their New York session eliminated all mention of exterritoriality from the revised *Règlement* adopted in 1929.

The chapter dealing with diplomatic privileges covers exemptions from taxes and customs dues, which M. Genet rightly regards as a matter of favour, not of strict law; freedom of worship and the various minor privileges which members of the diplomatic corps enjoy in the country in which they are stationed, such as those of displaying the arms and the flag of their own country, the right to be passed by the police through the lines of traffic, and the right to the services of a medical attendant of their own country irrespective of his local qualifications.

The inviolability and the independence of the diplomatic agent are admirably treated in another chapter. The chapter covers the juridical basis of the diplomatist's right to a special measure of protection at the hands of the country to which he is accredited, and includes a notice of the laws which most countries have enacted to ensure the fulfilment of this obligation. It covers also the immunities of diplomatic couriers and their dispatches, the duration of the special rights which diplomatists enjoy, and the extent to which malpractices on their part entitle the state to which they are accredited to disregard such rights.

The inviolability of the Embassy or Legation house and its offices, and the immunity from the criminal and civil jurisdiction of the state which members of the diplomatic corps enjoy are dealt with in the concluding chapters of the volume.

M. Genet does not profess to inculcate original views; in his preface he describes his task as that of setting out what is the accepted and settled practice as shown

by the practice of governments, the legislation of states, and the jurisprudence of the courts. It is as such that this volume will be found eminently useful. Violent diatribes against the injustice and the immorality of the very existence of diplomatic immunities, such as fill the pages of Laurent, are quite useless. Diplomatic immunities are a necessity of modern life, just as they were a necessity in ancient times; they are universally recognized; they exist. What is valuable is a plain statement of the recognized rules, as shown by precedent and practice, and this is what M. Genet's book gives us.

The work is charmingly written in easy and graceful French, and full of well-told tales of diplomatic incidents. What could better illustrate the need for a young diplomat to be able to choose the right moment for fulfilling a difficult and disagreeable task than the story, which was given in Mr. Vaughan Williams's lectures at The Hague a few years ago and is repeated by M. Genet, of Lord Odo Russell as a junior secretary at Constantinople? It happened during the time of Lord Stratford de Redcliffe, a potent but irascible chief. The Ambassador had been absent for a few days from Constantinople and on his return it was necessary to impart to him some information of a most unpleasant kind, information that was certain to produce an explosion. Lord Odo chose the moment when the Ambassador was descending a rope ladder from the deck of his steamer to the Embassy launch, when the thoughts even of the great Eltchi were concentrated upon getting himself in safety into the launch as it bobbed about in the tossing waves. By the time he had done so, the exasperation had exhausted itself. Lord Odo and his chief returned together in tranquillity. The story is more instructive to a young diplomat than pages of good advice.

No one will find M. Genet's pages dull. To Foreign Offices and to Chancelleries they should prove invaluable. C.

An Outline of International Law. By Dr. Julius Hatschek: translated by Professor Manning. London: G. Bell & Sons, Ltd. vi+364 pp. (16*s.* net.)

This is a translation by Professor Manning, now Cassel Professor of International Relations in the University of London, of the work which the late Professor Hatschek of Göttingen published in 1926 under the title of *Völkerrecht im Grundriss.*

The reason why Professor Manning has undertaken the labour of translating and issuing this work is explained in a little preface. Now that Great Britain has subjected herself to the obligatory jurisdiction of the Permanent Court of International Justice at The Hague in disputes with foreign states about questions of international law, it is becoming a matter of some importance that English lawyers should acquaint themselves with the writings of continental jurists on whose doctrines the foreign judges in the Court at The Hague will have been trained.

In the preparation of his volume Professor Manning has taken a bold course: he has reproduced in the English version the asperities of the German method of expressing legal conceptions and the complications of the German system of compounding sentences. He has made no attempt to tone the language down into something more akin to the English system of speech and more congenial to the English reader. He makes it clear in the preface that he has done this intentionally in order that the Englishman may the better understand the atmosphere and the general approach of a German scientist to the problem which

he tackles. Professor Manning may be right, but it makes his book hard reading; one can only hope that it may not make the book such hard reading as to discourage some of those who might otherwise make a study of Hatschek's work from doing so.

Hatschek was a hard worker and an original thinker, confident that his own opinions were right and somewhat disposed to hold the view that other people's were not. If he had not been cut off at the early age of fifty-four, he might have left a great name behind him. Hence an English version of his work on the "Outline of International Law" is valuable. It is not a compendious treatise which attempts to deal in detail with the whole science of international law or to discuss every precedent on which its rules can be based. Nevertheless, in its modest compass of 290 pages, it covers a wide field.

After preliminary chapters on the nature and character of international law as a legal system, on states and other subjects of international law, and on the international representatives of those states and subjects, it passes to a consideration of the system of the state acts to which international law attaches significance. In this section, which constitutes the greater part of the book, the subjects are mapped out and grouped under headings with which English readers are unfamiliar. It is only by a study of the contents of each that one begins to grasp the meaning of those headings. "Non-juristic international proceedings", for instance, is a term which covers the Concert of Europe, the Monroe Doctrine, and Admission to the League of Nations. The World Court at The Hague and various other international tribunals are described (and admirably described) under the curious title of "International Adjudicational Groupings". War is disposed of in a section of eight pages in a chapter devoted to various "International Law Juristic Transactions" and ranks as such with most-favoured-nation treaties, the peace-maintaining functions of the League of Nations and various others.

The strangeness of these terms to the average English reader is itself a justification of the labour which Professor Manning has undertaken. English-speaking publicists have accustomed us to a nomenclature which is totally different. If English students are to understand the contribution which Germany is making to a science that claims to be universal, differences in the way the field is mapped out and classified must not be allowed to count as obstacles.

The substance of Professor Hatschek's book is excellent. Sections such as those dealing with States and Combinations of States, with the Difference between International Protectorates and Colonial Protectorates, with Nationality, and with International Law Delicts and State Liability, afford admirable explanations of the matters considered. Other sections seem more open to question. An Englishman would scarcely be content with the treatment of territorial waters, and would say that the privileges of Consuls were put too high; nor would he accept the view (p. 222) that the League of Nations can conclude treaties, send envoys, and wage war. A few mistakes have crept into the book. It is not the English who regard the carrying of contraband as a delict (p. 260). The Mixed Courts in Egypt have not in general a jurisdiction in disputes relating to landed property (p. 77), nor did England adhere to the Triple Alliance (p. 174). These are small matters, and can be corrected in a later edition.

The book is well printed on good paper, and should constitute a valuable addition to the bookshelves of an English international lawyer. C.

Studies in Diplomatic History. By the late Sir James Headlam-Morley. 1930. London: Methuen & Co. 312 pp. (10*s.* 6*d.* net.)

The son and daughter of Sir James Headlam-Morley have collected in this volume nine of his essays, most of them written in his capacity of Historical Adviser to the Foreign Office, though they are in no sense official documents. The essays were well worth preserving, and it is good to be told that the author left other materials which the editors may be able to publish later.

Sir James Headlam-Morley was not a lawyer, but lawyers will find in his work the indispensable historical background to a number of subjects of present legal interest. There is, for example, a most valuable review of the history of arbitration, "the invention", as he justly says, "of Great Britain and the United States", whose experience therefore of its uses and limitations is worthy of attention. Any one who imagines that "vital interests" were an invention of the wicked diplomatists of the past, or that arbitration of itself can provide an alternative to war which the world is likely or indeed ought to tolerate, might read this essay with profit.

Three essays are grouped under the title of "The Problem of Security", and others deal with Egypt, Cyprus, the Straits, and the Reduction of Armaments. All of them show not only the complete command of the historical material which their authorship guarantees, but a rare appreciation of the uses as well as of the limits of historical analogy. The subject of each, the author tells us, was suggested by some political event or diplomatic problem of the moment; "but none of these problems were new". But if he felt that history repeated itself in the problems, he felt also that it had brought their solutions nearer. "War can only be permanently avoided when a political system has been established under which each nation, feeling that its reasonable demands are met, respects the reasonable demands of others. The real hope for the future lies in the fact that to a very large extent this necessary condition has been secured". "There are too many alarmists in the world. In fact, the political, as distinguished from the financial, dangers of the present are probably very much less than those with which our predecessors had to deal." The Locarno Treaties differ fundamentally from previous treaties of guarantee because they "quite definitely have as their object, not security in war, but security against war". This note of tempered optimism is prominent throughout the book. J. L. B.

Lehrbuch des Völkerrechts. Erster Teil. By Alexander Hold-Ferneck. 1930. Leipzig: Felix Meiner. 257 pp. (M. 7.80.)

This is the introductory part of a larger text-book of international law, the continuation of which, we are told, will appear before long. The author of it, a professor of international law at the University of Vienna, was for a long time associated with the work of the Austro-Hungarian Ministry for Foreign Affairs. He is of the opinion, to which he gives frequent expression, that international law regulates only a small and by no means the most important part of international relations, and that it is therefore necessary to supplement any exposition of it by reference to history, politics, sociology, and other cognate sciences. The book is intended for "German university students", and the author tells us that the reason for writing it was to appeal to the spirit of patriotism of the German nation and to bring home to it the realities of international law. Professor Hold-Ferneck is a jurist and legal philosopher of distinction, and it may therefore be

difficult to discard the book as an illegitimate incursion of nationalistic politics into the domain of international law. The author is one of the ablest of the modern "deniers of international law", and he somewhat surprises the reader by his obvious lack of sympathy with the object of the book as indicated in the title.

His book is a learned attempt to convince the German student that existing international law must not be taken too seriously. He doubts whether there is in the modern world any measure of unity of culture or law to serve as a basis for true international law. No nation, he says, can really understand another; even nations between which there is an affinity of race and language "are separated by a spiritual chasm which can never be bridged"; it is dangerous therefore to speak of a "world conscience" (pp. 23, 24). A true legal community between states is inconceivable (p. 86). The relation between sovereign states is necessarily one of enmity; peace is only a continuation of war although by different means; international law is a "modus vivendi" between states with a view to minimizing the effects of "the anarchy of sovereignties" by introducing, so far as possible, the element of law in the relations between them (pp. 12, 86, 88). He is, accordingly, convinced of the futility of the efforts of the League of Nations to achieve international peace and security. How is that possible, he says, "if sovereign states live, as has been repeatedly emphasized in these pages, necessarily and unavoidably in a relation of at least concealed enmity?" (p. 234). It is not surprising that Professor Hold-Ferneck's account of the activities of the League of Nations is not very appreciative. Even such successes as he feels bound to acknowledge are, to his mind, illusory for "the greater the success [of the League] the more doubtful must be its continued existence seeing that the Great Powers will cease to support it as soon as it becomes inconvenient to them" (p. 237). He is highly critical of the Permanent Court of International Justice, and in particular of Article 38 of its Statute, which lays down the sources of the law to be applied by the Court. The provisions of that article, which lay it down that the Court shall apply general principles of law recognized by civilized states, he regards as an expression of embarrassment calculated to conceal the inadequacy of conventional and customary international law. In addition, he says, "the question of sources of international law is a scientific question which cannot be solved by treaties" (p. 214). His attitude towards obligatory arbitration is a negative one. He regards it as inconsistent with the rights of self-preservation, to the discussion of which he devotes one of the longest chapters of the book. He concedes that the practice of states has now accepted a substantial degree of obligatory arbitration unaccompanied by the traditional reservations, but he regrets a radicalism which induces states to depart "from the large and clear paths dictated by the very nature of the state" (p. 151).

The present volume deals with the following topics: the method of the science of international law, the nature of its rules, rules of international conduct other than international law, international law and the state, international law and municipal law, so-called fundamental rights of states, recognition, sources, and subjects of international law. The book is a sad and, we believe, unprecedented instance of patently patriotic international law. Its presentation of facts is coloured by its general tendency and must be received accordingly. But its analysis is penetrating, as is its criticism of the imperfections of existing international law and of the contradictions between professions and practice.

H. L.

Die intrasystematische Stellung des Artikels XI des Völkerbundpaktes. Von Dr. jur., Dr. rer. pol. Josef L. Kunz. Leipzig: Noske. 1931. (RM. 9.)

This is the 21st volume of the series of Frankfort Treatises (Frankfurter Abhandlungen) on modern international law under the general editorship of Professors Giese and Strupp. It consists of an interesting and learned study of Article XI of the Covenant of the League in its relation to the whole system of the Covenant. The author emphasizes the distinction between the first and second paragraphs of the article and takes the view that the first paragraph confers a right and a duty on the League to take the initiative without waiting for action by any one of its Members. But what is "the League" in this connexion apart from its Members? The second paragraph, on the other hand, as the author recognizes, expressly requires the action of the individual Members of the League. The author examines carefully and in detail the relation of Article XI to the other articles, and particularly to Articles XV and XIX.

The author is a fervent adherent of the school of commentators of the Covenant who see in Article XI the most useful of all its provisions. He has read and digested the works of other students, in particular he is familiar with Mr. Conwell-Evans's "The League Council in Action". He finds, however, in Article XI, and in this he goes beyond other commentators, an authority of the Council to issue *orders* to Members of the League as to the action which they are to take in maintaining "the peace of nations". It is difficult to suppose that this new, and indeed revolutionary, reading of the Covenant is correct either as a matter of the formal interpretation of the text or as an indication of the action that either has been or will be taken by the Council of the League under this article. If Article XI had given a supra-national authority, the Covenant would have been framed on very different lines; Article XV in particular would not have been what it is. *Habent sua fata articuli*: the practice of nations will work out the destinies of the various provisions of the Covenant. In that working out, it is probable that the decisive considerations will be found rather in the political necessities of the crises which arise than in a nice examination of the language of the text.

It is regrettable that so carefully written a book should contain no index.

J. F. W.

Political Handbook of the World, Parliaments, Parties and Press as on January 1st, 1930. Edited by Walter H. Mallory, Yale University Press, for the Council of Foreign Relations, 45 East 65th Street, New York. 1931. 200 pp. ($2.50.)

Last year we drew attention to this very useful book of reference, which contains a survey of the parliaments, parties and press of those countries of the world which contain these institutions. We do not find any reference to Abyssinia or Afghanistan; can it be that they exist without any of these? The work has been brought up-to-date and will be found invaluable to all students of foreign affairs. It is interesting to note the names of the different parties in the various countries and to learn that there is still one state which is governed by a "True Whig" party, to which *all* the members of both houses of the legislature belong; this is the Republic of Liberia.

A. P. H.

MANDATES

Mandates under the League of Nations. By Quincy Wright. University of Chicago Press. 1930. xvi+726 pp. (27*s.*)

The Mandates System. By Norman Bentwich. London: Longmans, Green & Co. 1930. xii+200 pp. (15*s.*)

The International Mandates. By Aaron Margalith. Baltimore: Johns Hopkins Press. London: Humphrey Milford. 1930. x+242 pp. (11*s.* 6*d.*)

La Juridiction de la Cour Permanente Internationale dans le Système des Mandats. By Nathan Feinberg. Paris: Rousseau & Cie. 1930. 238 pp.

The literature of mandates now fills a bibliography of thirty pages in Professor Wright's book, and it is clear that the subject has already established itself as one of the major special topics of international law and relations. In so far as questions of law are concerned, this immense mass of writing is largely due to the vagueness of the original conception and to the obscurity of the form in which the League Covenant has attempted to express it. President Wilson desired to avoid what he called "a lawyer's treaty", and the language of Article XXII rather suggests that the work of the lawyer was transferred to the journalist. But if the lawyers were excluded as draftsmen, they have come back with a vengeance as commentators. Seldom has a richer carcass been provided for the eagles of academic jurisprudence, and not even the mystery of "Dominion status" opens up such a fair field of speculation as does the problem of hunting an elusive "sovereignty" in the mandated areas.

Professor Wright's exhaustive study of the literature has been rewarded by the discovery among twenty-two writers of ten different theories upon this question of sovereignty, and these theories he is able to classify in four groups. According to these competing doctrines, which admit of various combinations, sovereignty may be vested in (1) the Principal Powers, (2) the Mandatories, (3) the mandated communities, or (4) the League of Nations. It is therefore not surprising to find that the Council has preferred to act upon the excellent advice contained in M. Hymans' report to the San Sebastian meeting in 1920:

> "I shall not enter into a controversy—though it would certainly be very interesting —as to where the sovereignty in mandated territories actually resides. We are face to face with a new institution. Legal erudition will decide as to what extent it can apply to this institution the older juridical notions."

Perhaps the word "decide" was unduly optimistic, for it seems likely that we shall have to include this particular controversy among those which go on for ever. Meanwhile the experience of ten years has proved that the practical needs of government do not demand a solution of the doctrinal issue, or at least that the doctrinal approach has been along the wrong lines.

All the theoretical writers are keenly conscious, if not of their own, at least of one another's infirmities, and many of us will find a point of agreement with them all in thinking that collectively they have demonstrated that no one of the competing theories is adequate by itself. At this point perhaps history may afford us some help. The Middle Ages managed to get on very well without any abstract doctrine of sovereignty, the reason being that western Europe was deemed to have a dual unity centred in the Church and the Empire. About the respective limitations of these authorities there was fierce discussion, but no

prince could claim that he was entirely independent of both. Within the complex structure of western Europe there were countless varieties and degrees of dependence and independence, but the whole structure was felt to have some kind of unity. While this unity of Europe was being dissolved in the storms of the Reformation, Bodin discovered the word "souverain" in the technical language of French legal procedure, and used it to describe the new political systems that were being created on the basis of absolute independence. What is now happening is that we are trying to create a new organ of world unity, and in certain matters, particularly mandates, it has been endowed with a real measure of authority. On the political side we are really going behind the Reformation and trying to re-establish the idea of a common authority. This process has not yet gone very far, but, so far as it has gone, it has brought about a state of facts which cannot be explained by formulae that were invented to explain another set of facts.

Most of this trouble about mandates could have been avoided by recognizing that "sovereignty" is not a legal principle, but merely a descriptive word intended to describe certain political conditions if and when they exist. The theory that there must be a "sovereign" in every part of the inhabited earth is an unproved and unprovable dogma. In other words, sovereignty is really a question of fact and not a question of law. If we try to formulate it as a legal principle, we find at once, first, that it eludes satisfactory definition, and, secondly, that we are driven to all kinds of tortuous expedients in order to fit the facts into whatever formula we may choose to adopt. If, on the other hand, we recognize that the question is really one of fact, then we can readily agree that facts may vary almost infinitely, that sovereignty may be present in one place and absent in another, that it may be limited or unlimited, divided or undivided, that it is subject, in a word, to every influence that governs the relations of men. Bodin, more realist than many of his successors, fully recognized this. Concerned as he was to advance the claims of the French monarchy, he thought that there ought to be a sovereign everywhere, but he did not pretend that this was in fact the case. The distribution of authority in the world of to-day seems in a fair way to become as complicated as it was in sixteenth-century Europe, and over wide areas sovereignty, as Bodin defined it, has simply disappeared. States such as Egypt and Danzig, not to mention the British Empire, present problems essentially similar to that of the mandated territories. So far as we can hope for any doctrinal solution of these problems it must be found in the direction indicated by M. Rolin: "Le système des mandats sera en droit ce qu'il sera en fait".

But the limits of a review preclude any further discussion of the general question, and it is time to return to our authors. Mr. Bentwich, perhaps because he is a law officer in a mandatory administration, does not seek to inquire where sovereignty is to be found. Dr. Margalith thinks that "this question cannot be answered" (p. 177), and he does not wish it to be answered; "as matters now stand, this uncertainty is the greatest asset to the mandatory system". Professor Wright, on the other hand, devotes a large part of his book to an extremely learned and exhaustive analysis of the sovereignty problem. Ultimately he offers a solution of his own, which, if we accept his figures, must be reckoned as the eleventh. It is due to him to quote his conclusions in his own words:

"Thus perhaps our tentative statement might be completed by stating that sovereignty of the areas is vested in the League acting through the Covenant amending

process, and is exercised by the mandatory with consent of the Council for eventual transfer to the mandated communities themselves. In the case of Iraq and possibly other A communities, it appears that the native community already shares in the sovereignty. With this interpretation, sovereignty is in some cases held jointly by the League and the mandated community, the exercise of sovereignty being in those cases divided between them and the mandatory in proportions which vary according to the terms of the particular mandate" (p. 530).

This pronouncement is not easy reading, but its abundant caution is commendable. Detailed criticism may safely be left to those writers who by now are doubtless preparing the twelfth and subsequent solutions of the problem.

Of the four books under review, Professor Wright's must undoubtedly take rank as the most complete and authoritative study of the mandate system which has yet appeared in English. He examines his subject from every angle—historical, legal, and practical—and concludes with a carefully reasoned appreciation of the actual value of the system. In appendices he gives the full text of every mandate, together with elaborate statistics illustrating such matters as area, population, trade, expenditure on native welfare, and economic development. Throughout the book he gives full expression to his personal views, and his attitude, which perhaps is slightly hostile to the mandatory Powers, will not be shared by all his readers, but his treatment of controversial questions is always fair and temperate. Sometimes we come across expressions which Professor Wright would probably have modified, if his very full study of the documents had been supplemented by more personal contact with those who are engaged in the work of administration. For example, it seems a little less than generous to say (p. 98) that "the mandatories though indifferent if not antagonistic recognize their obligations". This impression may well be created by the mere reading of documents, for the replies made by governments to the League questionnaire are inevitably drafted as answers to criticisms, actual or potential, and their tone may appear to be somewhat defensive. But there is an immense amount of devoted and unselfish labour which cannot be adequately pictured in official reports or statistical tables, and a fuller appreciation of this would help to correct the balance of Professor Wright's work.

To the international lawyer the book will be especially valuable. The numerous legal problems, both theoretical and practical, are discussed with great thoroughness, and the learned author has collected a number of cases from the decisions of national tribunals which will not be easily accessible to most readers. Upon many points there is room for difference of opinion, but any adequate discussion of these difficult questions would extend far beyond the limits of a review.

Minor slips are somewhat frequent, but not usually important. A reference (p. 113) to M. Renault as "Mr. Reynold of France" suggests that Professor Wright, like other busy Ameriean writers, is sometimes tempted to place undue confidence in his stenographer. The statement (p. 506) that English law "protects possession against anyone except he with a possession older in origin" betrays more than one sign of some haste in composition. Again, it gives rather a false impression of the Mavrommatis litigation to say that "Great Britain was haled before the Permanent Court of International Justice by Greece" (p. 508).

Mr. Bentwich's book is very modest in scope. His own writing only occupies 134 pages, the rest of the volume consisting of documents printed in appendices. Within these narrow limits he has given a clear and useful account of the practical

working of the mandate system. The short chapter devoted to the B and C mandates is somewhat sketchy, but the administration of the territories under A mandates is described with sufficient detail. The fifth and last chapter gives a brief account of the working of the Permanent Mandates Commission and a rather fuller account of the judicial control exercised by the Permanent Court and by national tribunals.

In substance the book is an English version of the French lectures delivered by Mr. Bentwich at The Hague in 1929. From the discussion of controversial questions the author was debarred both by his own official position and by the rules of the Academy of International Law. "The result"—to use his own words—"may be colourless; but the aim has been simply to describe what is." There is so much that is too highly coloured in other writings about mandates that we need not complain of Mr. Bentwich's dispassionate method, but one may wish that the scheme of the lectures had allowed him room for a fuller treatment of his subject.

In one sentence only does Mr. Bentwich permit himself to pierce the veil of discretion with a ray of humour. "Since the riots of last August", he says (p. 50), "Palestine has been the land of inquiry rather than the Land of Promise. In addition to the Commission of Inquiry into the causes of the disturbances, which was appointed by the Mandatory, and the inquisition upon its work by the Permanent Mandates Commission, there has been a special inquiry into the reorganization of the defence and police force; the inquiry, still incomplete, into the conditions of immigration and land settlement; and, finally, the inquiry, now pending, of the international body into the dispute between the Moslems and the Jews about the Western Wall of the ancient Temple."

Although the time has now come when further writing about mandates should be discouraged rather than stimulated, we may say that Mr. Bentwich's book is too short. Some day perhaps he may find the time to write a really authoritative work upon the A mandates, a task for which he is clearly qualified both by scholarship and by official experience.

Dr. Margalith's book appears to have been prepared as a degree thesis, and it can only be ranked among the general body of minor writings about the mandates question. The subject is now so thoroughly covered that only an author of very unusual distinction can hope to make any new contribution to learning within the limits of a small volume. Dr. Margalith devotes two chapters to a discussion of the problem of sovereignty, but his treatment is far too superficial to be of permanent value. His legal equipment is also very insufficient, and he is compelled to rely upon an American law dictionary as the authority for his statements upon questions of Roman and English law.

It must be added that Dr. Margalith falls far below the standard of accuracy which scholarship demands. No competent reviewer will attach too much importance to occasional slips, but errors may be accumulated to an extent which can only be explained by a careless study of the sources. For example, on pp. 20–1 Lord Phillimore is no less than five times described as "Philmore". Sir Cecil Hurst's name is always spelled "Hirst", and the name of the Belgian capital is repeatedly given as "Brussells". Quotations from French sources abound in errors of grammar and spelling, and the author's own grammar is occasionally faulty. Even the text of the Covenant itself is inaccurately quoted on p. 94. It is not surprising that this carelessness in matters of form extends to matters of

substance. For example, we are told (p. 105) that it has been the general policy of France "to control and destroy all native customs and traditions". These examples may easily be multiplied, and it is clear that Dr. Margalith's habitual inaccuracy makes it impossible to regard his book as a serious contribution to the discussion of the subject.

Dr. Feinberg, on the other hand, has given us something really new by producing a highly specialized study of one particular question arising in the system of mandate control. The jurisdiction of the Permanent Court rests partly upon Article XXXVI of its own Statute and partly upon the arbitral clauses of the several mandates. These documents Dr. Feinberg analyses almost word by word, and the reader who follows his analysis will at least realize how extremely difficult it is to frame international legislation in a form that is reasonably free from ambiguity. For the most part the questions which he discusses still await solution. It is only in the Mavrommatis litigation that the terms of the mandates have come before the Permanent Court, and the bare majority by which the Court asserted its jurisdiction in the first of these cases makes it impossible to regard the question of competence as settled. That being so, there is naturally considerable difference of opinion among publicists, and Dr. Feinberg's views, which are in favour of an extended jurisdiction, will not always command unanimous assent. It would be difficult to summarize his conclusions without extensive reference to the reasoning by which they are supported, but he may be congratulated upon a really valuable and original contribution to the literature of mandates.

Taken as a whole, the problems presented by the new institution seem to be mainly those of administration rather than of law. Legal difficulties abound, but for the most part they do not seem to call for practical solution. After ten years of actual government by seven states acting under fourteen mandates it is at least gratifying to find that in only one case has the Permanent Court been asked to consider even a minor contravention of an international obligation. The issues in the Mavrommatis litigation were highly technical, and no question of broad policy was involved, the real plaintiff being neither a state nor the native population, but a foreign financier. Whatever the precise competence of the Permanent Court may be, it does not seem likely that it will be called upon to play a very active part in the system of control. Its own decision in the last Mavrommatis case indicates an unwillingness to push the jurisdiction to an extent which would involve interference with the normal working of internal government. Unquestionably this decision was sound in policy as well as in law. Courts can never govern directly, and it is neither desirable nor in their own interest that they should try to do so indirectly by continual interference with the work of government.

The ultimate success of the mandate experiment must depend upon the maintenance of good relations between the Permanent Mandates Commission and the mandatory Powers. This is a matter, not of law, but of common sense and good will, and sound policy will indicate that purely legal disputes should as far as possible be avoided altogether. Hitherto good relations have been maintained, on the one side by the integrity and good faith of the governments, on the other by the tact and experience of the members of the Commission. The latter have been careful to avoid the error of regarding themselves either as a super-government or as a court of appeal. Mr. Bentwich indeed does them an injustice when he speaks of them (p. 110) as "an international Areopagus", for

their true function has been to advise and help rather than to rule. If all goes well, the labours of the Commission should in course of time become gradually lighter. The A territories should pursue their appointed way towards a greater or less measure of independence. In the B and C areas, as time goes on and experience accumulates, the general lines of policy should become well settled, and there should be less frequent occasion for criticism or correction. If this be what the future holds in store, then perhaps we may hope that the question of sovereignty will be settled *ambulando*. H. A. S.

International Adjudications Ancient and Modern: Modern Series, Vols. I and II. Edited by John Bassett Moore: 1929 and 1930. New York: Oxford University Press. 8vo. cxiii+513 and xv+503. ($5.)

"Briefly expressed, the primary purpose of the present work is to exhibit the judicial phase of international life. Stated more definitely, its object is to furnish an intelligible and fully documented report of all judicial decisions of international questions not recorded in the ordinary law reports; and, with this object specifically in mind, I have, as is indicated in the title, endeavoured in each instance to combine with the documents a history of the case." In these words Mr. Moore introduces the first published results "of a design formed more than forty years ago, and persistently carried on through all the vicissitudes and distractions of a varied and busy life". The plan includes the publication not only of judgments and awards in the strict sense, but of "mediatorial reports, advisory opinions, and the decisions of domestic commissions, on international claims", that is to say, of all acts which "have brought an end to controversy, or contributed to its eventual solutions, on legal grounds".

The present volumes open with a short "General Introduction" and "Notes on the historical and legal phases of the adjudication of international disputes", the latter devoted mainly to an analysis of the meaning of "arbitration". Mr. Moore vigorously attacks three suppositions which are the stock-in-trade of those who would depreciate the usefulness of arbitration as a method of settling international disputes, namely, that justice according to law cannot be administered without permanent and professionally trained judges; that it can be administered only under compulsory jurisdiction; and that rules of conduct can have legal validity only when prescribed and enforced by a superior power; and he marshals an array of authority to show that arbitration is an essentially judicial process. Those who have denied it this quality, he thinks, have misconceived and overrated both the "judicial" element in municipal decisions, and the element of "compromise" in arbitral awards. "There is little opportunity in the affairs of men for purely 'judicial' deliverances, in the sense of applying clear and unquestionable law to plain and indisputable facts, not only without any element of compromise or adjustment, but with such certainty and lustre that they who run may read and not differ. Such things are not of this world." It is to be regretted that Judge Kellogg was not able to read this argument of his predecessor before his recent "Observations" in the Case of the Free Zones of Upper Savoy,[1] in which he has unfortunately revived the notion of a fundamental difference of function between judges and arbitrators.

The two volumes now published contain the record of a single arbitration

[1] *Publications of the Permanent Court*, Series A, No. 24, p. 35 *et seq.*

only, that of the Saint Croix River under the Jay Treaty of 1794. The documents available for Mr. Moore's use were found to be in a most unsatisfactory condition, which is explained in detail at the end of the second volume, and their editing has evidently been a most laborious and skilled task. The plan has been to give a narrative account of the proceedings preliminary to the sessions of the Commission, and then to print at length the arguments of the two Agents, consisting of no less than nine statements and counter-statements. These occupy the bulk of the space in the two volumes. The Award, which was unanimous, was very short, merely stating by reference to a map what the Commission held to be the course of the elusive river which had been referred to in the Treaty of Peace as the Saint Croix.

Among international lawyers the world over—and especially among those of the English-speaking countries, who have long been proud of Mr. Moore's pre-eminence among them—the predominant feelings aroused by these volumes will be admiration of the courage which could conceive a design so vast, and hope that he may carry it to a happy conclusion. J. L. B.

Die internationale Rechtspflege, ihr Wesen und ihre Grenzen. By Dr. Hans Morgenthau. Leipzig: Robert Noske. 1929. 170 pp. (8 marks.)

Dr. Morgenthau's book is a most scholarly, although somewhat negative, contribution to the question of obligatory arbitration. It is devoted to a discussion of what the author calls the objective and subjective limits of judicial settlement. By objective limits he understands the limitations resulting from the absence of applicable rules of law. In conformity with the view which is now gaining general acceptance, he arrives at the conclusion that there are no such limitations upon the activities of international tribunals. His treatment of this aspect of the question is clear and marked by unusual independence of approach. He extends the conception of a legal rule to any rule of decision capable of general application. His treatment of what he calls the subjective side of justiciability of disputes is less satisfactory. He arrives at the rejection of obligatory arbitration between states among which there exists an actual or potential relation of "tension", that is to say between nations in regard to which pacific settlement is particularly urgent. The main reason which leads him to this conclusion is the now current argument referring to the difficulties arising out of the absence of an international legislature able to translate into law the changes in the conditions of power and development.

The book, which shows an extensive knowledge of the literature on the subject, suffers from an obviously imperfect first-hand knowledge of international arbitration. This is perhaps the reason why the author does not seem to be aware of the possibilities of the judicial function as an agency in developing the law and in adapting it to new conditions. The same reason seems also to be responsible for his view that judicial settlement is incapable of settling disputes in matters of importance. Thus, for instance, a study of the history and of the proceedings of the Alabama arbitration would have saved him from the somewhat popular and inaccurate view that that arbitration was merely a diplomatic device to cover a diplomatic defeat of Great Britain. Undoubtedly, the will to arbitrate the matter was an essential condition for bringing about the arbitration, but the principal question is whether, given that will, judicial settlement is an appropriate method of removing friction. And a study of the proceedings of

the Geneva arbitral tribunal, including the episode connected with the American claim for indirect damages, would have convinced Dr. Morgenthau that that arbitration was not a mere formality. A close acquaintance with the history of international arbitration would also have saved him from attaching, as he does, decisive importance to the argument as to the impossibility of securing impartial international judges in matters of high political importance. He may be mistaken in assuming that within the state a decision in an individual case does not affect wider interests of the community as a whole or of third parties.

However, these are questions of opinion. Dr. Morgenthau's book sets a high standard in the discussion of obligatory arbitration. His treatment, in the concluding chapters of the book, of the various political reservations is interesting and illuminating, although of little practical importance, seeing that he rejects obligatory arbitration in questions of importance and between states in the relations of which it is particularly urgent. As an exposition of the orthodox view critical of obligatory judicial settlement in the present state of international organization, Dr. Morgenthau's monograph is one of the ablest contributions to the subject. It is certainly one of the best monographs in the useful series of *Frankfurter Abhandlungen zum Kriegsverhütungsrecht* for which Professors Strupp and Giese are responsible. H. L.

Internationales Verwaltungsrecht. By Dr. Karl Neumeyer. Vol. IV, Part II. Internal Administration. 1930. Munich, Berlin, and Leipzig: Schweitzer Verlag. 386 pp.

This volume marks the termination of the first part of Professor Neumeyer's monumental work on the international aspects of administration. The first three volumes have been devoted to a detailed description of institutions and legal provisions. The General Part will follow in due course. The present volume deals in the first instance with postal and telegraphic administration, and with weights and measures. The bulk of the book is taken up by the chapter on Currency, in which the author gives an account of the law relating to the recognition of foreign currency, and to debts payable in foreign currency. The question of states with common currency, currency problems which arise out of the occupation of territory and out of territorial changes, foreign indebtedness, payments in gold, depreciation of currency, and many other matters are also dealt with in this chapter. There is little in the book which falls within the scope of matters usually dealt with in text-books of international law, but the volume is an encyclopaedia of what may be called international financial law, and should be on the shelves of every one interested in this aspect of international relations. It would have been extremely useful had it been available at the time when the Permanent Court of International Justice decided the cases of the Brazilian and Yugoslav loans in France, and it has a direct bearing on the recent exchange of correspondence between this country and France on a similar matter.

Maritime Trade in War. Lectures on the freedom of the seas. By Lord Eustace Percy. 1930. Oxford University Press. 114 pp. (6*s*.)

This little book consists of six lectures which the author delivered before American audiences, and they are well worth being preserved in a permanent form. They are distinctly provocative of thought; the subject, though it has

become rather hackneyed, is approached with freshness of presentation. After an introductory chapter, the author discusses Pact and Covenant, Blockade and Contraband, Export Control, and the need for a fresh start, and his final chapter is called "Possible Solutions". The author deals with the question whether, as a result of the signature of the Kellogg Pact, there will be no more wars, and the further proposition that in a future war there will be no neutrals because of the implications of Article 16 of the Covenant. He is unable to accept the position that the Kellogg Pact or any similar document makes war impossible, neither does he hold the view that neutrality has been abolished by the Covenant. Lord Eustace is not very complimentary to international lawyers, who after all did not make the rules of international law, and it seems that he would exclude them from taking part in the scheme he adumbrates for solving some of the difficulties which he has exposed. This is that, in the first place, some Anglo-American organization should be set up in the nature of a research board to prepare a statement of the rules which the two countries are prepared to accept. He then deals with the possible solutions that this body might reach, amongst others he says "we are driven to the conclusion that the conception of contraband has ceased to have any distinct meaning and should be merged in the conception of blockade". Further, that international law should sanction the application of the doctrine of continuous voyage to the law of blockade, so reaching the position which was taken by the Allied Governments during the late war. But he would limit the use of these means of naval pressure to the party willing to submit his claim to judicial determination. If I understand the author's views correctly they come to this: where states have complied with the terms of the Covenant they will only be allowed limited rights of interference with neutral trade, for in what he calls "ordinary" wars he is prepared to abolish the right of blockade and of contraband; but in what he calls "emergency" cases the freedom of the seas should be superseded regularly and automatically by a stringent law of blockade. Enough has been said to show that the book is provocative; the limited space of a review precludes a fuller examination and criticism of the whole of the author's proposals, which are addressed, it must be remembered, to American audiences. They should, however, be read and pondered also by British readers. A. P. H.

Proceedings of the Fourth Conference of Teachers of International Law and related subjects, 1929. Washington: Carnegie Endowment for International Peace. 1930. 260 pp.

The mere possibility of holding a conference such as this, with an attendance of no less than eighty members, is evidence of the extraordinary interest in the study and teaching of international subjects in the United States to-day. The debates ranged over a wide field—the respective values of different methods of teaching, such as the seminar and the case method, the place to be accorded to the teaching of the laws of war and of international organization, the relation of international law to other aspects of international relations, a survey of the truly formidable mass of materials now available for research—and each of these topics gave rise to a stimulating exchange of views.

Interesting papers were also contributed by various members and associates of the Institute of International Law, which met at the same time and place as the Conference, generally with special reference to the problems and resources

of their respective systems of legal education, and the proceedings concluded with a debate on the relation of British and American Prize Law to International Law, to which Professors Hyde, Dickinson, Pearce Higgins, and Borchard contributed papers of divergent tenor but all vigorous and thought-provoking.

International Rivierenrecht. By A. W. Quint. Amsterdam: H. J. Paris. 1930. 147 pp.

Dr. Quint's essay makes only a slender volume, but for two reasons its importance must not be measured by its size. In the first place, the learned author may fairly claim the credit which belongs to the pioneer. Upon the question of navigation rights in international rivers there is now enough literature to fill a fair-sized library, but this is the first complete book which attempts to examine the legal problems created by the various economic uses of such rivers. Secondly, Dr. Quint approaches his task with a freshness of outlook that is in pleasing contrast with the arid pedantry which usually marks such scattered writing upon the subject as is otherwise available. He rightly stresses the fact that every river system has an individuality of its own, so that no dogmatic formula can cover every case:

"Meer en meer zal men in iedere rivier een eigen juridische en economische individualiteit moeten gaan onderkennen. Men zal nu deze individualiteit, welke wellicht in de theorie uit het oog is verloren, doch welke van den aanvang in het positieve recht aanwezig is, ook ten aanzien der niet-scheepvaartbelangen dienen te laten gelden" (p. 6).

Practical economic reasons point to the same conclusion:

"Een rivier, *a fortiori* een internationaal rivier, speelt een te belangrijke rol in het economische leven dan dat men met een beroep op rechtsdogma's een historischen toestand zou kunnen doen bevriezen" (p. 17).

Within the limits of a small book it would not be reasonable to expect a complete survey of all the diplomatic and judicial material that is now available, but the cases selected are competently handled. Attention is chiefly directed to the American material, including the Chicago, Rio Grande, and Boulder Dam controversies, as well as the decisions of the Supreme Court in inter-state suits. Dr. Quint is rightly critical of the decision of the German Staatsgerichtshof in the case of the "Donauversinkung", which indeed illustrates the impossibility of solving such problems by abstract legal rules. On the other hand he cordially approves of the enlightened practical statesmanship which enabled the British and Egyptian Governments to reach an equitable solution of the difficult question of the Nile.

The fact that Dr. Quint was an engineer before he became a lawyer may perhaps help to explain his keen sense of the practical, and it is clear that lawyers cannot expect to settle these international problems of river development entirely by the use of their own tools. This modest essay does little more than indicate the author's line of approach to his subject, but the work is well done, and we hope that Dr. Quint may be encouraged to undertake a fuller exploration of a field that is as yet almost untouched. H. A. S.

Le Principe des Nationalités. By Robert Redslob. 1930. Paris: Recueil Sirey. 276 pp. (40 fr.)

This book deals in a philosophical spirit, but with a wealth of historical illustration, with the conflict between the two principles, nation and state, from

the point of view that neither of the rivals can claim an absolute primacy, but that we need not on that account fall back on a purely empirical solution of each case in which they conflict. "Malgré la variabilité des situations et la fluidité des titres, il est possible de formuler quelques directives."

Chapter I traces the principle of nationality to a twofold origin in the movement of emancipation dating from the Renaissance and in rationalist philosophy. Chapter II analyses the concept and reviews the part that language and religion play in it, but concludes that its essence lies *dans la conscience d'un génie commun, sentiment qui fait naître une volonté de convergence politique.* Chapter III considers the forces arrayed against nationality and on the side of the state, and Chapter IV, the longest of the book, the possible solutions of the conflict by way of cession, secession, migration, decentralization, and protection of minorities. The discussion is throughout interesting and suggestive. J. L. B.

International Law. A Re-statement of Principles in Conformity with Actual Practice. By Ellery Stowell, Professor of International Law, American University. New York: Henry Holt and Company. xxvi+830 pp.

This is an ambitious book, of which the purpose is to present the system of rules which actually govern international relations, "based upon state practice and upon the dynamic laws of human relations". And the author expresses the hope that, if the arrangement of his volume stands the double test of conformity with state practice and consistency throughout, his outline may serve as the basis for the progressive codification of international law. Professor Stowell is a realist, sometimes indeed to the point of cynicism, who refuses "to accept any pretty conceit of world-law", and insists that the agents for the enforcement of international law are primarily the governments of the separate states, and that "in the fulfilment of this function, statesmen and their legal advisers have known how to cloak national policies in a garb of international law". It is another example of his realism that he lays it down as an established rule that after recourse to force the victorious state shall not exact more than a reasonable redress. "The rule is a practical expression of the recognized fact that competing states, for the very purpose of the competition in which they wish to engage, have need that other states remain independent and rich enough to purchase their wares." So, too, he expounds the rules of war, not as obligations of humanity, but as "such restrictions and exemptions as have been proved generally advantageous to the warring states without seriously impeding them in an effective prosecution of the war". International law is seen and studied, therefore, as a branch of international politics.

The author has already written a notable book upon Intervention; and he enlarges upon that branch of his subject. "When the rights of one state are injuriously affected by the abusive use of the sovereign action on the part of another state, when the rights of its nationals residing abroad have been ignored, or when the state's own sovereign position is not adequately respected, the injured state through its government intervenes to constrain the transgressing state to conform its conduct to international law." Intervention on behalf of the injured rights of its nationals in foreign lands is a peculiar interest of the United States; and in his emphasis upon intervention, as in other respects, the author manifests a national view of international law. It is probably the same interest which makes him regard the individual as the object of the law, which,

as he understands it, is "the preservation of a society composed of independent communities in such a way as to facilitate peaceful intercourse between persons in the different regions of the earth, and to assure one and all at least an irreducible minimum of security to life and property". It follows from his standpoint that he regards private international law, which he terms "the assimilation of law", as a part of the single subject, and he devotes considerable argument to that thesis.

In other parts of the subject he follows more conventional lines, and quotes largely from the standard works of Westlake, Lorimer, Sheldon Amos, Hall, Borchard, &c. But throughout the book the American interest comes out, as when he finds an example from the national society of the close relationship between law and politics (which he regards as one of the basic conditions of international law) in the fact that the judiciary is chosen by an elected officer, and the enforcement of the law entrusted to the elected officer or to one appointed by those themselves elected. It comes out again in the emphasis laid upon certain aspects of the law. Thus extradition is treated in eighteen pages, and the duties and privileges of consuls in nine pages; while the rules as to state succession are sketched in one page, and the rights of the territorial sovereign over the air, and the rights of a military occupant in the occupied territory, are each covered in one paragraph. The author points out that considerations of space have made it necessary to reduce to a mere outline the chapters dealing with certain important but well-understood principles, and what is interesting is the choice of matters on which he enlarges.

His attitude towards the League of Nations is also seemingly influenced by American conditions. For him the League is not the primary organization for the development of the law, as it is for most European writers, but an important institution extending the sphere of voluntary co-operation. It is remarkable, too, that in dealing with the recognition of new states, he says that "in the absence of an international organization it is left to each state individually to accord their recognition of a new member"; ignoring the provision in the Covenant for the admission of a new state to the League, which in great measure takes the place of the old recognition. Again he asserts the rights of a single state to intervene, as the United States claims to do in her continent, and makes light of the provisions in the Covenant. "Collective intervention is, after all, too difficult to organize and too cumbersome to direct for ordinary purposes." The latter statement is hardly justified by the history of Europe during the last ten years.

On the place of war in the international society he has some interesting reflections, which likewise reveal an American outlook. He remarks that the effect of the Kellogg Pact is that war is "inlawed" rather than outlawed, adopted as part of the machinery for the preservation of a just peace. He is not quite definite in his judgment of war. In the preface he suggests that "it is our duty to consider whether the preparation for war is not possibly destined to play an important part in selecting those who are fit". But in the latter part of the book, where he writes an essay on political and moral philosophy, after examining the alleged advantages of war, he comes down on the side of disarmament, adopts the maxim of Ramsay Macdonald that the nations must be willing to "take the risk of peace", and concludes that no war for a political purpose can ever be justified. In this final essay on international politics, he puts forward

a perturbing doctrine that the world must again gravitate towards a balance of power, in which the Anglo-Saxon states, on the one side, and Russia and Japan, as the Powers most opposed to America, on the other, must be the dominant factors. And when "the communities have come to be relatively permanently associated into two groups", international law, understood as a body of rules depending on the support of a preponderating majority for its enforcement, will have disappeared. In other words, he does not accept the idea of a society of states gradually recognizing the sway of law over their relations by virtue of its inherent rightness and reason; and for the future as in the past, he looks upon international law as part of international politics.

But if here and there the author appears to be poised between the old order and the new, and being in the New World is chary of recognizing a change of spirit in the Old, yet he has written a book which is refreshing and stimulating upon many points, and which shows that it is possible still to formulate original views upon even the oldest branches of the law of nations. N. B.

Eléments du Droit International Public, Universel, Européen et Américain. By Karl Strupp. 2nd ed. Paris: Editions Internationales, 4 bis rue des Ecoles. 3 vols.

This is an impressive work, not only because of its intrinsic merits, but also for the picture it conveys of the vast field now covered by international law. The scope and variety of the subjects which are to-day regulated by law, in the form of treaties and agreements of various sorts, and the extent to which the international community is organized and provided with institutions for conducting affairs of common concern and settling differences, are hardly realized to the full even by students. Works on international law of the old type give but little assistance in forming a true picture of the present state of things. It is one of the great virtues of this book that it conveys a broad view, in true perspective, of the new conditions.

The scheme of the work comprehends the whole field of international law in the widest sense, i.e. including the juridical rules and relations established by treaties. The exposition had necessarily to be highly compressed, and the author has adopted the useful method of prefacing each heading in the various chapters by a full bibliography, giving all the material required for detailed study. This is followed by a short definition or statement of the law, accompanied by comments showing how far the rule enunciated is controverted. The fairness with which this scheme is carried out enables the reader to obtain a remarkably correct idea of the state of the law on any given point.

Professor Strupp belongs emphatically to the classical school in fundamentals—he bases the whole structure of international law upon the axiom *pacta sunt servanda.* The recognition of this principle is what gives international law its obligatory force, and accordingly the necessity for acceptance of any particular rule is insisted upon strictly and consistently throughout. From this basic principle the author concludes that international law need not necessarily be the same for all states, and therefore gives full support to the now popular conception of European and American, side by side with universal, international law. Besides these general bodies of law, he recognizes "particular" law—juridical rules agreed upon by two or more states.

The strictness of the author's approach leads him to reject or limit a number of rules usually classed as international law by other writers, and is illustrated, for example, by his remarks on the subject of "general principles of law". These he rejects as a source of international law in so far as the phrase connotes a kind of *jus naturalis*, or "reason of the thing". If "general principles of law" refers to fundamental principles inherent in the very nature of any juridical system, like good faith, express mention is (he holds) unnecessary, whereas if the reference is to certain principles found in all juridical systems, such as prescription, they do not apply in the law of nations.

Another interesting general point is the author's view that the notion of "sovereignty" must be eliminated from international law. Sovereignty, he says, is important for the purposes of municipal law, but has led to endless confusion and misunderstanding in international law, and should be replaced, according to circumstances, by the clear conceptions which it covers, such as unlimited capacity to act, independence, state power. The author holds that it is perfectly possible to do this, as he proves by never again using the objectionable word!

Among the many controversial questions which are dealt with—always with penetration—not the least interesting is the discussion of the *clausula rebus sic stantibus*. The learned author denies that one party to a treaty can divest itself of its obligations unilaterally on the ground of a radical change of circumstances. In fact, there is no *clausula*. The true principle is that one party cannot demand of the other that the treaty should continue to be observed if this is contrary to good faith, by which he apparently means if the interpretation of the will of the parties leads to the conclusion that they did not intend the treaty to continue in force. On the other hand, Dr. Strupp upholds a right of necessity—narrowly defined, it is true—which entitles a state to disregard a treaty without committing an international wrong. These questions are among the most difficult and also the most important in international law. The author's view as to the *clausula rebus sic stantibus* is of great value, and it seems a pity that he should so largely destroy the effect of his conclusions on this point by supporting the doctrine of necessity, although with his usual fairness he indicates how heavy is the weight of contrary opinion. This seems one of the few instances where he endorses a rule without sufficient warrant.

More than half of the first two volumes is devoted to the law contained in treaties, beginning with the foundation of the *Union postale générale* in 1874, through the various economic and social conventions, then passing on to the Peace Treaties, and finally dealing with the great network of contemporary international agreements for the prevention of war. This part of the work is of the greatest value and contains an astonishing amount of illuminating comment and documentary material in a comparatively small space. The pages devoted to the League of Nations are particularly instructive, although there is room for disagreement with the learned author's interpretation of Articles 11 and 16 of the Covenant.

The laws of war are wisely relegated to an annex of some hundred pages.

Volume III contains the text of all the principal post-war instruments for the organization of peace: the Covenant, the Statute and Rules of the Permanent Court of International Justice, the Locarno Treaties, Kellogg Pact, General Act, Naval Disarmament Treaty of 1930, and Memorandum on European Federation.

There can be no question that this is one of the most weighty and valuable,

as well as one of the most learned, works on international law that has appeared in reeent times. An English edition would bc welcome. A. P. F.

La Revisione dei Trattati e i Principî Generali del Diritto. By Giovanni Ercole Vellani. Modena: E. Bassi & Nipoti. 1930. 196 pp. (Lire 12.)

The two parts of Signor Vellani's title might well have been reversed, for the greater part of the book is taken up with a discussion of general principles, and it is only in the last chapter that he reaches the question of treaty revision. Beginning with an analysis of the general nature of international law, he passes on to discuss the charaeter and functions of the state, from which he proceeds in the fourth chapter to explain the meaning of "subjective inter-state law". The final chapter is devoted to a vigorous attack upon the doctrine of *rebus sic stantibus*.

Signor Vellani's treatment of his subject is purely doctrinal, and the reader must not expect to find an objective discussion of the difficult problems of treaty revision whieh are at present agitating Europe. To Signor Vellani "tutti i trattati sono contratti, e contratti politici" (p. 133). For this reason he criticizes Fauchille's fourfold classification of treaties; although "utile in pratica, difetta di un solido principio logico e dottrinale su eui basarsi". This rigorously contractual eonception of treaty obligations naturally leaves no room for any legal rights that do not rest directly upon the consent of the parties:

"Il concetto di rivedibilità o possibilità di revisione di un trattato, e in generale di ogni negozio giuridico interstatale, è dunque un concetto in gran parte negativo, visto che solo la espressa volontà consensuale d'ambo le parti costituisce una justa causa, cioè una condizione necessaria sufficiente affiinchè un fatto (mutamento o permanenza delle circostanze, economiche, politiche, ecc.) o un atto (negozio giuridico internazionale) sia giuridicamente qualificabile, e abbia effetti giuridicamente rilevanti. Non può sussistere alcuna presunzione juris et de jure che produca di per sè stessa, automaticamente, la modifica d'un vincolo contrattuale fra stati, ma soltanto una presunzione juris tantum, per cui cioè sia ammessa dalla legge—che nel campo internazionale è il negozio giuridico primitivo o una successiva esplicita dimostrazione d'una concorde diversa volontà, o *mutuus dissensus*—la prova contraria" (p. 194).

This strictly theoretical mode of treatment is commoner in Continental than in English writing upon international law, and most of us will probably feel that the practical problems of treaty revision are too complex to be solved by a process of deduction from a single formula. But Signor Vellani has given us an excellent example of the deductive method, and it is well for us sometimes to be reminded that both reasoning and action should be based upon principles.

H. A. S.

Der Völkerrechtliche Schutz der nationalen, sprachlichen und religiösen Minderheiten. Unter besonderer Berücksichtigung der deutschen Minderheiten in Polen. By H. Wintgens. (Handbuch des Völkerrechts, Band 2, Abteilung 8.) 1930. Stuttgart: W. Kohlhammer. 8vo. xxxv+502 pp. (RM. 28.)

This book is a comprehensive study of the development of the conception of minority protection as one of the tasks of international law, and of the regulations which have been devised to that end. The historical section goes back to the Religious Peace of Nüremberg in 1532 and the first Capitulations in 1535. In the more familiar region of the development of minority protection as a complement to the principle of "self-determination" the author gives various interesting

pieces of information not found in every study of the question: for instance, an account of the measures introduced by Germany in Posen in 1917 as a counter to Wilson's "self-determination", and of the Statute of Autonomy promulgated in the Ukraine after the Peace of Brest-Litovsk. The Upper Silesian Convention, as the most detailed and explicit instrument recognizing minority rights, is analysed at considerable length. Finally, the proposals for the improvement of procedure made in 1929 are discussed. Dr. Wintgens pays but slight attention to the point of view of those who wish to see the Minorities Treaties and Declarations interpreted as restrictively as possible; he barely notices the comments made by the Governments directly concerned in the proposals for reform, and he throughout regards the legal personality of minorities as an accepted fact. Certainly, those who deny it may be mistaken, but it must be recognized that the interested Governments do deny it, and that both the Council and the Sixth Committee of the Assembly appear to have upheld them. The book also contains very full statistics of German minorities and an account of the organizations for the defence of minority rights which exist in some of the countries under the treaty régime.

LUCY MAIR.

Research in International Law since the War. By Quincy Wright. Washington: Carnegie Endowment for International Peace. 1930. 58 pp.

The remarkable development of the Law of Nations since the World War to which Dr. J. B. Scott refers in his Prefatory Note is reflected in every page of Professor Quincy Wright's survey, which was prepared originally as a report to the International Relations Committee of the Social Science Research Council. It is a small book, but it is a valuable one. The author divides his work into two sections: (1) Conditions affecting the research in International Law, and (2) Tendencies in International Law research. He appends a list of books and articles referred to in the text, which covers 20 pages. The book is very suggestive and could only have been written by one with an almost encyclopaedic knowledge of the modern literature on the subject. The conclusion of the author is that "International Law can advance best by first giving efficient constructive aid to international institutions, so that they can satisfactorily fulfil their functions of codification, legislation and adjudication". There may be differences of opinion on the comparative importance of these functions of international institutions, but it is believed that there will be complete agreement on the great value of Professor Wright's survey of the tendencies of modern International Law.

A. P. H.

Les Fonctionnaires Internationaux. By Suzanne Basdevant (Dr. en Droit). Avec préface de M. Gilbert Gidel. 1931. Paris: Librairie du Recueil Sirey. iii + 335 pp. Cr. 8vo.

The question of the legal status of the "public" or "civil" servants of such international bodies as the League of Nations has as yet attracted little notice in this country, so little indeed that in the excellent bibliography appended by Mlle. Basdevant there is mention of only one article, on one aspect of this question, by an English author, namely, that published in this Year Book in 1929 under the name of Sir Cecil Hurst. No doubt the question appears somewhat remote in a country which has no acquaintance with any conception of a "droit administratif" and whose municipal law deals with the analogous problem by a

fiction of "the King's pleasure", yet the solution of this problem is very necessary to the proper development of the League of Nations.

Mlle. Basdevant is naturally compelled by the legal tenuousness of her subject into a good deal of over-curious definition and, perhaps, some profitless speculation, especially in the first chapter. It may well be that in the present state of affairs "an international functionary" is determined better by example than by a logical definition. The subject naturally also lends itself to a certain amount of repetition of the obvious, which Mlle. Basdevant has not entirely avoided. Yet the book is highly interesting in that it affords a good conspectus of the present position of that new and very important entity—an international civil service—which will in time probably acquire in international affairs a power not inferior to that already acquired by its counterpart in the business of states. And it is not unreasonable to attempt to settle juridically the status of that servant, to safeguard him from encroachments by his national sovereign, and to protect him in his dealings with the "international person" who employs him.

A person who has not concerned himself with this part of the League's activity will probably be surprised by the degree of elaboration which the question of the internal and external position of the League's servants has already received. It is not the least merit of Mlle. Basdevant's study that the "histoire raisonnée" of that elaboration is given in a clear and detailed manner. Her book makes unneeessary, for the complete exposition of the problem, reference to any other secondary material, though no doubt the original documents may profitably be consulted. It represents in a comparatively small volume a faithful and painstaking exploration of a field of international law which in this country has been much neglected.

There is unfortunately no index; and though the "table des matières" is detailed, the usefulness of the book would be increased by the addition of a real index. C. J. H.

The Doctrine of Continuous Voyage, particularly as applied to Contraband and Blockade. By James W. Gantenbein. 1929. Portland, Oregon: The Keystone Press. vii + 207 pp. ($3.50.)

This is a careful piece of work, submitted by the author in partial fulfilment of the requirements for the Ph.D. degree in Columbia University. The subject falls into four periods: the development of the doctrine prior to the American Civil War; the Civil War period; the interval between 1865 and 1914; and, lastly, the period of the World War. In the first period the author shows a number of applications of the doctrine of Continuous Voyage before its connexion with the Rule of War of 1756. The intervening chapters show that the author has made a careful study of the cases since that time, but when he comes to formulate the existing rules on the subject resulting from the practices of the belligerents in the war of 1914–18 he finds himself in doubt on several important points. He gives a tabulated statement regarding the applicability of the doctrine to various situations which arose during the war, with his views as to their validity. As regards the applicability to absolute and conditional contraband, he considers it "sound", but he is "doubtful" as to blockade, and, as asserted by the British Foreign Office in defending the Retaliatory Orders in Council, it is considered as "unsound". He also considers the presumption of hostile destination in the "statistieal cases" unsound, but that the abandonment of the subjective tests of

continuity is "generally sound". He adds that the recent applications of the doctrine, sound or unsound, and regardless of their retaliatory setting, will unquestionably, in the absence of a prior international agreement, be cited as valid precedents by belligerent Powers with control of the sea. He sets forth several alternative plans for submission to the Powers with a view to an agreement, and finally advances a "scrap the lot" solution by advocating the abolition of contraband and a declaration that the doctrine of Continuous Voyage is inapplicable to blockade.

Whatever may be thought of Mr. Gantenbein's summaries and of his proposals for the future, and the limits of a review preclude their critical examination, the book contains a great deal of valuable matter drawn not only from British and American sources, but also from the decisions of all the belligerent Prize Courts during the World War, and merits the attention of all who take an interest in such an unfashionable subject as the laws of naval warfare.

A. P. H.

La Juridiction de la Cour Permanente de Justice Internationale. By the late Professor Géza de Magyary. 1931. Paris: Les Éditions Internationales. 318 pp.

This work was unfortunately interrupted by the death of the learned author, a distinguished Hungarian jurist, after he had completed the analysis of seven judgments and thirteen advisory opinions. It has been prepared for publication by M. Olof Hoijer, who has contributed an introduction and some supplementary notes, to which M. Charles Dupuis has added a preface. Even in its incomplete form the book must clearly rank among the leading works upon the Permanent Court.

The first chapter is devoted to "observations générales" upon the importance and legal character of the Court, its functions and competence, the limits of the advisory jurisdiction, and an analysis of the procedure. To M. de Magyary the merit of the Court is to be measured chiefly by the degree of its conformity to the nature of regular tribunals established under municipal law. In the permanence and independence of the judges and in its employment of a fixed procedure it conforms to municipal standards. It departs from these standards in permitting states to insist upon the presence of national judges and in the rule which allows the Court, by consent of the parties, to decide *ex aequo et bono*. These departures from the standards of municipal justice M. de Magyary views with regret, though he admits that they are necessary concessions to the present state of international opinion.

To most readers the chief interest of the book will lie in the author's critical analysis of the individual cases. The Court is seldom unanimous, and M. de Magyary is not always on the side of the majority. For example, in the *Wimbledon* case he follows the minority in defending a "restrictive" interpretation of Article 380 of the Treaty of Versailles, and this leads him into an interesting discussion of the general theory of interpretation.

"Le juge en appliquant le droit n'est pas un simple outil du législateur, mais plutôt l'âme du droit. Dans sa fonction judiciaire il est obligé de prendre en considération toutes les conséquences qui se rattachent à l'application d'une certaine norme juridique. Et en procédant ainsi, il est tenu à s'abstenir d'appliquer le droit d'une telle manière qu'elle pourrait aboutir à des conséquences absolument contraires à l'esprit du droit. Dans ce

cas, une des plus nobles et difficiles tâches du juge est de recourir à l'interprétation restrictive" (p. 182).

Again, M. de Magyary finds himself in agreement with a minority in thinking that the Court should have assumed jurisdiction in the *Eastern Carelia* case. To him the issues involved in this opinion are of fundamental importance, since they concern the competence, not only of the Court but of the League itself. In his view the question is governed by Article 17 of the Covenant, which gives the League jurisdiction over disputes with non-member states. "Si le Conseil a le droit de demander dans une affaire quelconque un avis consultatif à la Cour, celle-ci est indubitablement obligée de le donner, sans avoir la faculté de se déclarer incompétente." (p. 92.)

It goes without saying that M. de Magyary's views will not always command agreement, but the value of the critical method which he has adopted lies in the fact that it compels the reader to reflect upon the fundamental questions that are involved in the decisions. The doctrine of *stare decisis* is expressly negatived by the Statute of the Court, and we cannot hope for a constant tendency of the jurisprudence until some measure of agreement upon fundamental questions has been reached. For this it is essential that we should have more critical discussion of the kind which M. de Magyary has given us in this book. It is a great pity that his work was cut short before he reached the *Lotus* case, the only one in which the Court has been asked to consider a general rule of international law unobscured by the text of particular documents.

This notice is written on the eve of going to press, and is quite inadequate to do justice to the interest of M. de Magyary's book, which is one that no student of the work of the Permanent Court can afford to ignore. H. A. S.

Commentaire du Pacte de la Société des Nations selon la politique et la jurisprudence des organes de la Société. By M. Jean Ray. 1930. Paris: Librairie du Recueil Sirey. 717 pp.

M. Ray, who already, as early as 1920, wrote a book on the Covenant before it had been tested in action, now returns to the charge with a commentary of 700 pages based exclusively on the actual experience of the League. He confines himself of set purpose to the citation of published sources; but it is evident that he has watched the League in action at close quarters, and we learn from the title-page that he holds the post of Legal Adviser to the Japanese Foreign Office. What gives its special flavour to the book is its combination of legal acumen with practical judgment based on a knowledge of actual forces at work. The diligence with which the relevant material has been collected from the League documents (eked out occasionally, as in the case of the Extraordinary Assembly of 1926 (p. 199), with other published revelations) and the skill with which it has been analysed and presented, are beyond praise. Although the commentary method involves risks of duplication, and of treating kindred subjects at a distance from one another, it is probably the best suited to the author's purpose, which is presumably to give an account of the working of the League during the past ten years. The moment for writing a more systematic work on the new system has not yet arrived: its organs are still too plastic and its circumstances too uncertain.

M. Ray does not shrink from expressing decided opinions of his own, though they are not such as to place him in any particular political or other camp, unless

it be that of the sensible men. Thus, on the question of the publicity of the League proceedings, he dryly remarks (p. 82) that it is all very well to have public sittings of the Council and the Assembly, but that we should like to know more of "the political, economic, and financial designs which are often the hidden springs of the actions of governments". In his very frank analysis of the change in the character of the Council between 1920 and the present time he re-echoes the declaration of M. Scialoja in 1926 to the effect that, if ever the number of the permanent members is once more increased, the number of the non-permanent members must be diminished (he quotes the indiscretion of the *Temps* in recording a "meeting of the five permanent delegates"): should the newcomer be the United States, he adds, it is not likely that any state will threaten to leave the League. Meeting the objection that the Council might find itself, at an emergency, in a condition where hardly any of its members were not involved in the dispute, he suggests the creation of a form of substitute membership which would be bestowed, in certain circumstances, on the most recent ex-non-permanent members. The account of Article VIII is particularly outspoken. He regards it as "certain" that "all the Members of the League are in a position of equality", but he makes perhaps excessive play with an ill-considered remark by a Bulgarian delegate in order to argue that the object of the régime of equality is the maintenance of peace and not the equalization of the chances of victory in a new war. He takes a severe view of the action of the Council in composing the Permanent Advisory Commission of officers, describing the resulting body as "neither truly permanent nor truly international" (p. 325).

In the account of Article XI the analysis of the difference between the two paragraphs is open to objection. He considers that they both apply equally to situations in which "peace is endangered", the difference being simply in the degree of the proximity of the danger. He does not seem to realize that the acceptance of the Kellogg Pact, if, as is hoped, it removes the danger of war, would thus result in removing also the occasion for making use of Article XI. Yet it is to this article, rather than to XIX, that we must look for relief against the dangers of crystallization. It is therefore necessary to guard against any and every attempt to restrict the meaning of the words "any circumstance whatever affecting international relations which threatens to disturb . . . the good understanding between nations on which peace depends".

The observations on Article XXIII show that M. Ray has followed closely the proceedings of the technical organizations. He notes the tendency (p. 654) "to give satisfaction to certain interests or influences by creating new bodies which more or less usurp the place of old ones"; he admits a measure of justice in the Italian criticisms of the Opium Advisory Committee; and he remarks on "the hesitation as to the degree of autonomy granted to the technical organs". He also roundly declares that "nothing is more artificial" than the pretended distinction between political and technical questions. Incidentally, he is mistaken, in this connexion, in attributing the association of the League with technical activities to General Smuts (p. 125). If credit is to be given, it is mainly due to Mr. L. S. Woolf.

Even Homer sometimes nods. On p. 309 M. Ray (or the printer) tells us that "the conversations of M. Briand and Dr. Stresemann at Thoiry prepared the Locarno agreements". But this is a small blemish indeed in an indispensable volume.

ALFRED ZIMMERN.

Die staats- und völkerrechtliche Stellung Britisch-Indiens. Von Dr. Wolfgang Kraus. *Frankfurter Abhandlungen zum modernen Völkerrecht.* Heft 17. Leipzig: Universitätsverlag von Robert Noske. 226 pp. (RM. 12.)

Readers need not be deterred from opening this book by the flaming legend on the band: "Indien auf dem Weg zur Selbständigkeit." It is apparently an attempt by the publishers to touch the market for sensationalism. The book is in fact a dispassionate study of the legal implications involved in the present relations between British India and Great Britain. It is obviously based upon wide reading and reflects credit upon the author.

Chapter I contains a fair historical sketch from the founding of the Honourable Company to 1918. This is treated, rightly, in three periods, the first taking the history up to the Regulating Act of 1773, the second going as far as the Mutiny, and the third discussing India under the Crown. Chapter II describes the present organization of the Government of India, the system of diarchy in the Provinces, and the relation between the Government of India and the India Office. It treats incidentally of the Chamber of Princes, though it is not an essential part of the subject-matter. Chapter III takes the constitutional structure further by explaining the constitutional conventions which modify the purely legal theory. This Chapter deals in particular with the position of India in the Imperial Conference, and then proceeds to discuss in what category of political entities India can be placed. This is not very edifying, but is part of the German tradition.

Chapter IV deals with the system of appeals to the Privy Council, the Indian Civil Service, and the military organization. In Chapter V the author comes to the substance of his work, to which all the rest was essentially introductory. Here he discusses the position of "India" as distinct from "British India" as a subject of International Law. He makes clearly the distinction that whereas the Indian States are constitutionally not part of the British Empire they are so internationally. He accepts the view of Westlake, Oppenheim, and Hall that the States themselves are not subjects of International Law. And he discusses in detail the problems raised in connexion with treaties and the position of "India" in the League of Nations. The final chapter on the Reform of the Constitution was obviously not called for by the rest of the book, but explains shortly the position as it was in the first half of last year. Eight pages are devoted to bibliography. In the Appendix all the important documents are given in English. These include the Rules for the Qualifications of Electors for the Bombay Legislative Council, the Constitution of the Chamber of Princes, quotations from the reports of Imperial Conferences, Correspondence with the International Labour Office as to the position of India, the recommendations of the All Parties Conference at Allahabad in 1928, and Lord Irwin's Proclamation as to the goal of Indian constitutional development. W. I. J.

Die Gestaltung des Britischen Weltreichs nach den jüngsten Reichskonferenzen. Von Dr. Siegfried Krautkopf. *Frankfurter Abhandlungen zum modernen Völkerrecht,* Heft 19. Leipzig: Universitätsverlag von Robert Noske. 113 pp. (RM. 5.)

This pamphlet was written before the Imperial Conference of 1930, and is therefore already out of date. It is mainly concerned with the Conference of 1926, and looks at the Empire from the economic and political rather than the

legal point of view, the author believing that by studying the interplay of conflicting emotions and interests at the Imperial Conferences it is possible to see exactly how far the Empire is a unit, and how far the emotions and interests are tending towards its disintegration. That such a method cannot be entirely satisfactory is clear. The preservation of the unity of the Empire depends to so great an extent upon sentiment, which does not normally appear at the Conferences, that a false view is necessarily obtained.

After a short Introduction, the author sets out in tabular form the present organization of the Empire. This follows in the main the form given in the Dominions and Colonial Office List. It is, however, difficult to understand why that order is departed from by separating "Australia and its six component states" from the other Dominions. British Guiana also is wrongly placed; and it is somewhat dangerous to class the Sudan as an example of *condominium*. The third Chapter deals with the Colonial and Imperial Conferences from 1887 to 1918. The discussion is necessarily short, and does not take us further than the summaries in the Dominions and Colonial Office List or in Professor Keith's *Responsible Government in the Dominions* (which, incidentally, is not quoted by the author). Chapter IV deals with the Conference of 1921; Chapter V with that of 1923; and Chapter VI with that of 1926. Since all the problems—legal, constitutional, political, and economic—of these three Conferences are dealt with in less than eighty pages, the treatment is necessarily summary, and the author has attempted to take a bird's-eye view of the whole development. It has, however, the advantage that the author is able to obtain a more complete conspectus of the whole. He himself points out the errors of those who imagine, because the Empire cannot be fitted into the formal categories of the jurists, that it either does not exist as a unit, or will shortly cease to exist as such. It helps, therefore, to correct the false impressions obtained in Germany through the writings of the formal jurists on the one hand and the sensation-mongers on the other. Naturally its summary nature reduces its value for English readers, but even they will derive advantage from examining the point of view of one to whom the whole conception of Empire as now held is a novelty. The book will enable English readers to see how anomalous are many of the things which have become so familiar that their precise character tends to be obscured. W. I. J.

Problems of Peace. Fourth Series. Lectures delivered at the Geneva Institute of International Relations, August, 1929. Oxford University Press. 1930. xii and 215 pp. (price 8*s.* 6*d.*). *Problems of Peace.* Fifth Series. Lectures delivered at the Geneva Institute of International Relations, August, 1930. Oxford University Press, 1931. xvii and 319 pp. (price 8*s.* 6*d.*).

If public opinion is ill-informed on the subject of international relations it is not due to lack of material, and it is to be wished that books such as these might have a wide circulation. Ten lectures are contained in the fourth series and fourteen in the fifth series of *Problems of Peace*, and all of them will repay study. Sometimes they will arouse opposition in the minds of many readers, for the lecturers speak frankly: there is no uniformity of thought, but real independence of judgment. Some of the lectures make rather heavy going, but there are others, such as those on *The Monroe Doctrine and the League of Nations* and *The Difficulty of Disarmament*, by Professor de Madariaga, which attract by the lightness of touch and the humour of the writer. International lawyers will turn to *The*

Contribution of Law to Peace and *The Legislative Function in International Relations*, by Professor Brierly, and *The Freedom of the Seas*, by Mr. Alec Wilson, and will not be disappointed, though many will not agree with all the conclusions which these writers reach. The lectures are by no means all of equal merit, but the Geneva Institute of International Relations may be congratulated on maintaining a high standard amongst those who are invited each year to lecture to its international audiences. The Editor of the Fifth Series justly claims that the five numbers of *Problems of Peace* contain material not to be found elsewhere and of the highest value for students and lecturers and all who are interested in the great purpose for which the League of Nations stands. A. P. H.

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(In this Bibliography the following abbreviations are used: B.Y.B. = "British Year Book of International Law"; A.J.I.L. = "American Journal of International Law"; Acad. dip. int. = Académie diplomatique internationale"; Hague Recueil = Recueil des Cours, Académie de Droit International de la Haye; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int. pub. = Revue de droit international public; Rev. de dr. int. = Revue de droit international; Rev. de der. int. = Revista de derecho internacional; Riv. di dir. int. = Rivista di diritto internazionale; Niemeyers Zeitschrift = Niemeyers Zeitschrift für internationales Recht; Zeitschrift f. V. = Zeitschrift für Völkerrecht.)

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Russia. Notes exchanged on the occasion of the resumption of diplomatic relations with the Union of Soviet Socialist Republics. London, December 20, 1929; Moscow, December 21, 1929. (*Treaty Series No.* 2, 1930.) [*Cmd.* 3467.] 2*d.* (2½*d.*)

—— Temporary Commercial Agreement between H.M. Government in the United Kingdom and the Government of the Union of Soviet Socialist Republics. London, April 16, 1930. (*Treaty Series No.* 19, 1930.) [*Cmd.* 3552.] 2d. (2½*d.*)

Spain. Convention between His Majesty and His Majesty the King of Spain regarding legal proceedings in civil and commercial matters. London, June 27, 1929. (*Treaty Series No.* 18, 1930.) [*Cmd.* 3544.] 3*d.* (3½*d.*)

State Papers. British and Foreign State Papers. (Incorporating Hertslet's Commercial Treaties.) Vol. CXXII, 1925, Part 2. (59.0045.22.00.) 27*s.* 6*d.* (28*s.* 3*d.*)

Sweden. Convention between His Majesty and the King of Sweden regarding legal proceedings in civil and commercial matters. London, August 28, 1930. (*Sweden No.* 1, 1930.) [*Cmd.* 3689.] 3*d.* (3½*d.*)

Switzerland. Exchange of Notes between H.M. Government in the Irish Free State and the Swiss Government respecting Unemployment Insurance. Berne, November 3–4, 1930. (*Treaty Series No.* 51, 1930.) [*Cmd.* 3750.] 1*d.* (1½*d.*)

—— Exchange of Notes between H.M. Government in the United Kingdom and the Swiss Government respecting Unemployment Insurance. London, November 19, 1929. (*Treaty Series No.* 8, 1930.) [*Cmd.* 3489.] 1*d.* (1½*d.*)

Trans-Jordan. Agreement between His Majesty and the Amir of Trans-Jordan. Signed at Jerusalem, February 20, 1928. Ratifications exchanged October 31, 1929. (*Treaty Series No.* 7, 1930.) [*Cmd.* 3488.] 2*d.* (2½*d.*)

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—— Exchange of Notes between H.M. Government in the United Kingdom and the United States Government regarding the interpretation of Article 19 of the London Naval Treaty 1930. London, June 5, 1930. (*Miscellaneous No.* 11, 1930.) [*Cmd.* 3597.] 1*d.* (1½*d.*)

Universal Postal Union. Postal Convention, with detailed regulations for its execution, and Agreement concerning insured letters and boxes. London, June 28, 1929. (*Miscellaneous No.* 15, 1930.) [*Cmd.* 3688.] 1*d.* (1½*d.*)

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